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The Silliness of ERISA: The Plan is Not the Only Proper Party Defendant in an ERISA Benefits Claim

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THE SILLINESS OF ERISA: THE PLAN IS NOT THE ONLY PROPER PARTY DEFENDANT IN AN ERISA BENEFITS CLAIM

By Donald T. Bogan*

ERISA recites in § 502(d)(1) that a plan can sue and be sued as an entity. Does such a legislative pronouncement, in and of itself, establish the plan as a juristic person? Further, does Congress's declaration that a plan can be sued suggest that no other person or entity can be held liable in an ERISA § 502(a)(1)(B) benefits claim? Relying upon ERISA § 502(d)(1), long-standing authority in the Ninth Circuit Court of Appeals, and in other circuits, holds that the plan, and only the plan, is a proper party defendant in an ERISA § 502(a)(1)(B) benefits claim. That is silly.

A plan may be funded or unfunded. If a plan is funded through a trust, the trustee is a juristic person that controls the assets of the trust, which assets can be applied to satisfy a § 502(a)(1)(B) judgment. Particularly when a plan is unfunded, it "owns" no assets. A plan is not a person—it is not an individual or a partnership, and plans are neither incorporated nor are they unincorporated associations. A plan is not any kind of traditionally recognized juristic person. Rather, a plan is a contract; and a plan participant's § 502(a)(1)(B) benefits claim seeks to recover money damages for breach of the plan contract.

The plan sponsor establishes the plan and is the primary obligor responsible to satisfy the promises it made to covered workers as detailed in the written plan contract. In order to enforce the sponsor's promises and to collect any possible judgment obtained in a § 502(a)(1)(B) benefits claim, the obligor under the plan contract (the sponsor), plus any other party that assumes liability under the plan contract by agreement with the

plan sponsor (a trustee or an insurer), must be party defendants.

ERISA does not expressly limit the universe of possible defendants that can be liable in a § 502(a)(1)(B) benefits claim. In fact, Congress expressly contemplated that there may be defendants beyond just the plan when it specified in § 502(d)(2) that any money judgment obtained against a plan shall not be enforceable against any other person “unless liability against such person is established in his individual capacity . . .” While a number of courts have now created some exceptions to the strict Ninth Circuit rule that only a plan can be sued in a § 502(a)(1)(B) claim, and have allowed benefit claimants to also sue parties that “control” ERISA claims decisions, these courts have failed to identify the legal paradigm that supports their decisions.

At last, the Seventh Circuit Court of Appeals has recognized that a plan insurer can be held liable in an ERISA § 502(a)(1)(B) claim because the insurer is an obligor under the plan contract. All courts should follow the Seventh Circuit’s lead, and recognize that a § 502(a)(1)(B) claim seeks legal relief for breach of the plan contract, with all that holding entails for ERISA benefit claim processes. With that result, we will the not have to worry, as a practical matter, whether the plan “entity” is a juristic person.

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I. INTRODUCTION

One hundred years ago, courts viewed an employer's promise to provide an employee fringe benefit—perhaps the promise of a small living stipend for a loyal worker during the worker's retirement—as a promise to make a gift.¹ A promise to make a gift, of course, is generally unenforceable.² A gift recipient typically gains rights under the gift promise only after there has been some transfer of the gift *res*.³ Consequently, in the early twentieth century, if a disappointed worker sued his or her employer for failing to deliver on the employer's promise of retirement benefits, courts routinely dismissed the action because the promise was unenforceable as a matter of law.⁴

Even after courts finally recognized that employee benefits are not gratuities,⁵ but are more akin to deferred compensation,⁶

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1. *See* *McNevin v. Solvay Process Co.*, 53 N.Y.S. 98, 99 (1898), *aff'd*, 60 N.E. 1115 (N.Y. 1901) (per curiam). *See generally* 2 MURRAY WEBB LATIMER, *INDUSTRIAL PENSION SYSTEMS IN THE UNITED STATES AND CANADA*, 681-706 (1932).

2. *See* *Dougherty v. Salt*, 125 N.E. 94 (N.Y. 1919) (Cardozo, J.) (holding that a written executory promise to make a gift is unenforceable); *Schnell v. Nell*, 17 Ind. 29, 32 (Ind. 1861) (holding that a husband's written promise to satisfy a devise made in his late wife's will unenforceable).

3. *See* *Fischer v. Union Trust Co.*, 101 N.W. 852, 853 (Mich. 1904) (holding that when a father gave a deed to certain real property to his daughter, along with his oral promise to pay off a mortgage on the property, the gift of the real property was effective with the transfer of the deed, but the promise to pay off the mortgage could not be enforced against the father's estate after he died without paying the mortgage debt). *See generally* Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821, 822 (1997); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1264, 1275 (1980); *see generally* Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 411-426 (1977).

4. *See e.g.*, *Menke v. Thompson*, 140 F.2d 786, 790 (8th Cir. 1944).

5. *See* LATIMER, *supra* note 1, at 18-19 (remarking on how employers formalized their plans and used plans to gain tax advantages and as a tool to manage and control their workforces). Jay Conison, *Foundations of the Common Law of Plans*, 41 DEPAUL L. REV. 575, 587-588 (1992) (citing *Bowler v. Nagel*, 200 N.W. 258, 260 (Mich. 1924)).

6. *See* *Inland Steel Co. v. NLRB*, 170 F.2d 247, 250-53 (7th Cir. 1948) (holding that employee benefits are a form of "wages" or "other conditions of employment" subject to collective bargaining and expressly rejecting the employer's argument that employee benefits are in the nature of a gift). *See generally* Conison, *supra* note 5, at 589-618, 593-594 n. 64. *See generally* discussion in text accompanying notes 167-168, *infra*.

workers still frequently failed to collect anticipated benefits. Courts strictly enforced adhesive plan contracts in an era of laissez-faire contract interpretation.⁷ Additionally, prior to ERISA's enactment in 1974,⁸ neither state nor federal law generally required plan sponsors to fund private pension plan promises,⁹ or to mandate reasonable vesting rules that would grant workers a non-forfeitable right to receive earned pension benefits.¹⁰ Consequently, workers enrolled in unfunded or underfunded pension plans often lost promised benefits if the employer became insolvent,¹¹ and workers who left their

7. See *Magnolia Petroleum Co. v. Butler*, 86 S.W.2d 258, 262 (Tex. Civ. App. 1935) (upholding plan language allowing employer to terminate pension benefits at will); *Cowles v. Morris & Co.*, 300 Ill. 11, 16-24 (1928) (same). For cases applying a similar rationale for denying claims arising from ERISA-governed welfare plans, see *Owens v. Storehouse, Inc.*, 984 F.2d 394, 397 (11th Cir. 1993) (quoting plan language as follows: "The full, absolute and discretionary right is reserved in the Plan for the Plan Sponsor to amend, modify, suspend, withdraw, discontinue or terminate the Plan in whole or in part at any time for any and all participants of the Plan."); see also *Hamilton v. Air Jamaica, Ltd.*, 945 F.2d 74, 77-78 (3d Cir. 1991) (enforcing plan reservation of rights clause despite district court's conclusion that the plan disclaimer allowed plan sponsor to avoid paying promised benefits whenever it wanted). See generally Catherine L. Fisk, *Lochner Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L.J. 153, 169-70, 198 (1995). *McGann v. H & H Music Co.*, 946 F.2d 401, 405 (5th Cir. 1991), *cert denied sub nom.*, *Greenberg v. H & H Music Co.*, 506 U.S. 981 (1992).

8. ERISA is the common acronym for the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1997) and in scattered sections of the Internal Revenue Code). A selected history of ERISA, beginning in January 1973 with the introduction of House Bill 2, H.R. 2, 93d Cong. (1973) and Senate Bill 4, S. 4, 93d Cong. (1973), provided the framework for the final legislation and are compiled in a three-volume committee print. See S. COMM. ON LABOR AND PUB. WELFARE, 94TH CONG., LEGIS. HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (1976) [hereinafter LEGISLATIVE HISTORY]. For a wonderful political history of ERISA, reaching back well before January 1973, the date that the Committee Print begins, see generally, JAMES A. WOOTEN, *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY* (2004) [hereinafter WOOTEN, A POLITICAL HISTORY].

9. One exception to this general statement is for some collectively-bargained plans. See Labor Management Relations Act of 1947 (Taft-Hartley Act) § 301, Pub. L. 80-101, 61 Stat. 136, *codified at* 29 U.S.C. § 185 (mandating that Taft-Hartley plans be funded through a trust administered jointly by management and labor representatives).

10. See S. REP. NO. 93-383 at 3 (1973), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 8, at 1071 and S. REP. NO. 93-127, at 8-9 (1973) *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 8, at 594-95.

11. See James A. Wooten, "*The Most Glorious Story of Failure in the Business*": *The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683, 683-84, 730 (2001) (describing the loss of expected pension benefits for approximately 4,500 automobile workers when Studebaker-Packard collapsed and its

employment for any reason prior to retirement age often had earned no right to receive anticipated pension benefits.¹² Further, even after recognizing that employee benefits are not gratuities, some courts inexplicably deferred to plan sponsor decisions to deny benefits claims, except when the worker established that the claim denial was arbitrary or capricious.¹³

Congress enacted ERISA because “many . . . employees and their beneficiaries had been deprived of anticipated benefits.”¹⁴ ERISA regulates private employee benefit plans,¹⁵ including both pension benefit plans and welfare benefit plans.¹⁶ ERISA

pension plan was underfunded).

12. See WOOTEN, A POLITICAL HISTORY, *supra* note 8, at 91-97.

13. In *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 138-143 (3d Cir. 1987), *aff'd in part and rev'd in part*, 489 U.S. 101 (1989), Judge Becker traced the history of the arbitrary and capricious standard of review in employee benefit plan claims prior to ERISA. In particular, the D.C. Circuit Court of Appeals cases cited by Judge Becker indicate a confused Circuit Court that ultimately resolved that employee benefits are not gifts, but create contract rights. *Id.* at 141-143 (citing *Kennet v. United Mineworkers of America*, 183 F. Supp. 315 (D.C. Cir. 1960). Surprisingly however, in *Kennet*, after District Judge Holtzoff determined that employee benefit plan participants enjoyed legal protection under contract law to enforce their employee benefit plan promises, he then still imposed a deferential standard to review a plan administrator's claim denial. *See id.* at 317-319.)

14. 29 U.S.C. § 1001(a) (Congressional findings and declaration of policy). *See also* S. REP. NO. 93-127, at 5 (1976) (Comm. Print), *reprinted in* 1 LEGISLATIVE HISTORY, at 591 (“In almost every instance, participants lose their benefits not because of some violation of federal law, but rather because of the manner in which the plan is executed with respect to its contractual requirements of vesting or funding”).

15. As the name of the statute suggests, Congress enacted ERISA to reform the private pension industry. ERISA comprehensively regulates private pension plans, *see* *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361-362 (1980), at least in comparison to ERISA's very minimal regulation of welfare benefit plans. *See* *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 727, 732-33 (1985).

16. Employee benefits, commonly described as “fringe” benefits, provided or available to workers and their family members through the worker's employment, are defined in ERISA as being either “pension” benefits or “welfare” benefits. A pension plan is: “any plan, fund, or program which [is] . . . established or maintained by an employer or by an employee organization, or by both, . . . [that] provides retirement income to employees, or results in a deferral of income by employees. . . .” 29 U.S.C. § 1002 (2012). A welfare benefit plan is:

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship, or other training programs, or day care centers, scholarship funds, or prepaid legal services, . . .

imposes minimum vesting standards for private pension plans,¹⁷ and it requires sponsors of private pension plans to fund the benefit promise, usually through the establishment of a trust or through the purchase of annuity insurance contracts.¹⁸ However, ERISA's vesting and funding rules do not apply to welfare plans.¹⁹ Consequently, sponsors of welfare plans can “self-fund” their health care plans by paying covered benefits out of operating capital on an “as-you-go basis”;²⁰ or they can

29 U.S.C. § 1002(1) (2012).

17. See 29 U.S.C. §§ 1051-1058 (2012) (Participation and Vesting). One of several factors that caused workers not to receive anticipated benefits prior to ERISA was the commonplace circumstance that workers did not earn any right to receive expected pension benefits until the workers actually retired after many years of service to the employer (forfeiture risk). See S. REP. NO. 93-127, 93d CONG. 1ST SESS. at 8, *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 8, at 594-595. ERISA's vesting rules now allow workers to earn a right to receive pension benefits incrementally after a minimum number of years of employment. Because of ERISA's vesting rules, pension plan sponsors remain obligated to pay such incrementally earned retirement benefits even if the worker separates from employment prior to normal retirement age and even if the sponsor terminates the plan. See *id.*

18. See 29 U.S.C. §§ 1081-1085 (2012) (Funding); see also 29 U.S.C. § 1103 (2012) (Establishment of trust). Congress recognized the problem with unfunded and underfunded pension plans. When sponsors paid retirement benefits out of operating capital there was a (default) risk that workers who had earned the vested right to receive promised pension benefits under the plan might still lose legally entitled benefits if the sponsor suffered financial distress. By imposing funding requirements for pension plans, and by inaugurating a pension plan termination insurance program in Title IV of ERISA (creating the Pension Benefit Guaranty Corporation (PBGC)), Congress created a system to secure plan sponsor pension plan promises. In ERISA, the plan sponsor's promise to provide employee benefits as specified in the plan contract is essentially “collateralized” or secured through ERISA's mandate that the sponsor set money aside in a trust to pay earned pension benefits or to purchase a commercial insurance product (typically annuity contracts) to pay the benefits. The plan contract is similar to the promissory note in a secured real estate transaction. Both the plan and promissory note define the nature and extent of the promisor's obligation—the promisor in an ERISA plan being the plan sponsor. The plan trust is then akin to the real estate deed of trust that provides a kind of collateral that allows the promisee (plan participants and their beneficiaries) to enforce the plan contract promise if the promisor/plan sponsor otherwise fails to pay covered benefits.

19. See 29 U.S.C. § 1051(1) (2012) (vesting rules do not apply to welfare plans); 29 U.S.C. § 1081(a)(1) (2012) (funding rules do not apply to welfare plans).

20. Self-funded plans are also often referred to as “unfunded” plans or “self-insured” plans. Sponsors of employee health care plans often self-fund plan promises up to a specified attachment point, and then purchase commercial stop-loss coverage to re-insure the plan sponsor for any payments made above the attachment point. See *generally* Am. Med. Sec., Inc. v. Bartlett, 111 F.3d 358, 361 (4th Cir. 1997) (describing how plan sponsors may self-fund their employee health care plans in order to avoid state insurance regulation and then purchase commercial stop-loss reinsurance to protect against plan risk). See also Computer Aided Design Sys., Inc. v. Safeco Life Ins. Co., 235 F. Supp. 2d 1052, 1053, 1062 (S.D. Iowa 2002), *aff'd*, 358

establish a trust to pay promised benefits; or they can purchase insurance to pay benefits.²¹

The lack of vesting and funding requirements for welfare plans exposes ERISA welfare plan participants to many of the same forfeiture and default risks that pension plan participants endured prior to 1974.²² Further, confusion over the application of trust law principles—rooted in the law of donative transfers—to ERISA claims,²³ versus the understanding that employee benefit plans involve contract rights, still permeates plan participant claims to recover benefits due under the terms of an ERISA plan.²⁴ These issues, all impacting a welfare plan

F.3d 1011 (8th Cir. 2004) (describing stop-loss contract between self-funded plan sponsor and stop-loss reinsurer).

21. See e.g., *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 105, 115 (1989) (involving an unfunded severance benefit plan). Collectively-bargained multi-employer plans, where liability for participating employers is generally limited to the amounts contributed to a multi-employer plan trust, are beyond the scope of this article.

22. See generally WOOTEN, A POLITICAL HISTORY, *supra* note 8, at 4-5, 9-10, 15, 25 (discussing forfeiture risk and default risk).

23. See *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 142-143 (3d Cir. 1987), *aff'd in part and rev'd in part*, 489 U.S. 101 (1989). See generally RESTATEMENT (THIRD) OF TRUSTS § 1 (reciting that RESTATEMENT is not intended to summarize the law of commercial trusts or trusts used as a security instrument).

24. Compare *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146, 148 (remarking that Congress designed the remedy contained in 29 U.S.C. § 1132(a)(1)(B) “to protect contractually defined benefits . . .”), with *Firestone Tire & Rubber Co.*, 489 U.S. at 115 (applying a trust law-based standard of review in an ERISA claim under 29 U.S.C. § 1132(a)(1)(B) to recover benefits due under a severance benefits plan). Even after the *Firestone* Court ruled that a trust law-based standard of review governs ERISA benefits cases, courts have further confused the issue by equating administrative law review standards with trust law review standards. See Mark D. DeBofsky, *The Paradox of the Misuse of Administrative Law in ERISA Benefit Claims*, 37 J. MARSHALL L. REV. 727, 727-28 (2004). The question of whether an employer’s promise to provide fringe benefits to its workers should be governed by the law of donative transfers, or enforceable under contract law, has been contested since the earliest employee benefits cases. In *McNevin v. Solvay Process Co.*, 53 N.Y.S. 98 (1898), *aff'd*, 60 N.E. 115 (N.Y. 1901), dissenting Judge Green stated:

In the first place, it should be remarked that [the plan provision reciting that] the sums to be paid are to be deemed gifts, and not transferable, cannot alter or impair the true character of the instrument or its legal effect and operation. A promise, founded upon a valuable consideration inuring to the benefit of a promisor, to pay a sum of money upon specified contingencies, is not a promise to make a gift, even though the parties call it so.

Id. at 103 (Green, J., dissenting). See also *McLemore v. Western Union Tel. Co.*, 171 P. 390, 394 (1918) (enforcing participant’s contractual right to benefits, despite reservation of rights language in plan which gave the administrative committee

participant's ability to enforce his or her reasonable expectations to receive plan benefits,²⁵ coalesce in a series of cases which hold that the *only* proper party defendant in an ERISA benefits claim is the plan itself.²⁶ Those cases should prompt further reflection—what is a plan? What is the legal relationship between the plan, the plan sponsor, the plan administrator, the plan trustee (if any), and the plan participant? And how did Congress expect a participant to enforce a sponsor's welfare benefit plan promise, particularly under an unfunded plan?

ERISA contains a civil enforcement provision²⁷ that, among other claims, grants workers and their covered family members the right to sue in federal court to recover promised benefits—pension and welfare benefits—due under the terms of an employee benefit plan.²⁸ The Supreme Court has consistently ruled that a plan is a contract, and that an action under ERISA § 502(a)(1)(B) seeks to recover “contractually defined benefits.”²⁹ Given that express remedy to pursue money damages for breach of the plan contract, it is rather startling that any federal court would have ruled that the proper party defendant in a plan participant's action to recover benefits due under the terms of his or her plan is the plan, and *only* the plan.³⁰ This outcome is all the more remarkable because Congress did not say that a

appointed by Board of Directors complete discretion and control over claims against the plan).

25. For pension plan participants, ERISA's mandatory funding rules, supported by ERISA's pension plan termination insurance program, generally provide a reasonable level of protection against the default risk that plagued participants prior to ERISA; however, both welfare and pension plan participants continue to suffer under the court-invented, nominally trust law-based deferential review standard applied in ERISA benefit claims. *See generally* Donald T. Bogan, *ERISA: The Foundational Insufficiencies for Deferential Review in Employee Benefit Claims—Metropolitan Life Ins. Co. v. Glenn*, 27 HOFSTRA LAB. & EMP. L.J. 147 (2009). *See infra* note 86, at 406-407 (cases holding that the plan, and only the plan, is a proper party defendant in an ERISA § 502(a)(1)(B) benefits claim). *See generally* JEFFREY LEWIS ET AL., *EMPLOYEE BENEFITS LAW* (3d. ed. 2012) (hereinafter *EMPLOYEE BENEFITS LAW*), at ch. 13, IV (Judicial Review).

26. *See* discussion in text accompanying notes 86-96, *infra*.

27. 29 U.S.C. § 1132.

28. *See* § 1132(a)(1)(B) (allowing participants to sue in state court or federal court, though defendants typically remove state court-filed ERISA claims under federal question removal jurisdiction).

29. *See* *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-48 (1985) (remarking that Congress designed the remedy contained in 29 U.S.C. § 1132(a)(1)(B) “to protect contractually defined benefits”). *See* discussion accompanying notes 111-118, *infra*.

30. *See* discussion in text accompanying notes 56-76, *infra*, and cases cited therein.

plan shall be the only party defendant in an ERISA benefits claim.³¹ Further, the holding requires a promisee to sue the plan contract itself, and does not permit suit against the promisor who made the contract—and the plan contract, as such, is not a legal or “juristic” person with capacity to own property or assets that a sheriff can sell to enforce a judgment against the plan.³²

This article explores the evolution of ERISA case law as courts have slowly recognized that ERISA’s civil enforcement provision does not expressly limit the universe of legal persons that may be proper party defendants in an ERISA benefits claim. That examination of case law reveals a surprisingly indifferent reading of ERISA in one line of federal court ERISA cases, and perhaps even some hostility to lawsuits that previously had been routinely handled in state court.³³ Then, even as courts in a second line of cases rejected requests to limit the field of defendants that plaintiffs could sue in a benefits claim to just the plan, these courts have largely applied an incorrect legal paradigm that can still shield the promisor under the plan contract from direct liability. Unfortunately, the second, better line of cases that generally allow participants to sue whoever “controls” the claims decision,³⁴ still reflect a misreading of ERISA, a misconception of what is a plan, and a misunderstanding of the relationship among the ERISA parties and the plan contract. If a plan is a contract, and a § 502(a)(1)(B) claim to recover benefits due under a plan is governed by ordinary principles of contract law,³⁵ then contract law processes should dictate what party may be liable for breach

31. See discussion accompanying notes 77-80, *infra*.

32. See *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 239-240 (3d Cir. 1994) (McKelvie, J., dissenting) (remarking that the plan owns no assets except the insurance contract purchased by the plan sponsor to fund the benefit plan). See discussion accompanying notes 72-74, *infra*.

33. See *Judicial Conference of the United States*, LONG RANGE PLAN FOR THE FEDERAL COURTS, 166 F.R.D. 49, 96 (Dec. 1995) (Rehnquist, C.J.) (“ERISA allows participants and beneficiaries of employee welfare (e.g., health insurance and severance pay) plans to bring actions in either federal or state court to recover benefits due under the terms of the plan and to enforce or clarify plan terms. Resolution of those cases turn, not on the specific substantive provisions of ERISA or its underlying regulations, but on contract and trust law principles embodied in a ‘federal common law’ developed from state legislation and common law. Under a system of judicial federalism, the federal courts should not be involved in the adjudication of disputes that do not require their particular expertise because they essentially involve application of state law.”).

34. See discussion in text accompanying notes 98-102, *infra*.

35. See *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (January 26, 2015).

of the benefit plan. Finally, in 2013, the Seventh Circuit Court of Appeals applied contract law principles to hold that a plan insurer responsible to pay approved claims as an obligor under the insurance plan is a proper party defendant in an ERISA § 502(a)(1)(B) claim for benefits.³⁶ The next step is to apply that contract law foundation to hold that employer/plan sponsors are the obligors under non-insured plan contracts, with all that entails.

II. ERISA'S PLAIN LANGUAGE INDICATES THAT CONGRESS DID NOT INTEND TO LIMIT THE UNIVERSE OF POSSIBLE DEFENDANTS IN AN ERISA § 502(A)(1)(B) CLAIM TO RECOVER BENEFITS DUE UNDER THE TERMS OF A PLAN

A. ERISA § 502

ERISA's civil enforcement provision, detailed in § 502 of the statute,³⁷ specifies who—which “persons” as defined in the statute—have standing to sue, and also describes the claims for relief available to those persons under ERISA.³⁸ Plan participants³⁹ and beneficiaries⁴⁰ can sue under ERISA § 502(a)(1)(B) to recover benefits due under the terms of a plan, or to enforce rights, or to clarify rights to future benefits under the

36. See *Larson v. United Healthcare Ins. Co.*, 723 F.3d 905, 911-916 (7th Cir. 2013). See also discussion in text accompanying notes 112-117, *infra*.

37. 29 U.S.C. § 1132 (2012). See *infra*, note 46 (reprinting ERISA § 502 as initially enacted in 1974).

38. 29 U.S.C. § 1002(9) (2012) (defining the term “person” to mean “an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.”). The term “employee organization” is further defined in 29 U.S.C. § 1002(4). Notably, a plan entity is not identified as a person or party that can pursue a claim for relief in any of the subparts of ERISA § 502 that specify particular claims available under ERISA and who can be a plaintiff under such subparts. Further, the plan is not identified as a party or person that can be sued in any of the subparts of § 502 that specifically limit who can be sued under those subparts. See 29 U.S.C. §§ 1132(a). See also discussion in text accompanying notes 47-50, *infra*.

39. 29 U.S.C. § 1002(7) (describing a “participant” as an “employee or former employee . . . who is or may become eligible to receive a benefit” from an employee pension or welfare plan).

40. 29 U.S.C. § 1002(8) (describing a “beneficiary” as “a person designated by a participant . . . who is or may become entitled” to receive an employee pension or welfare plan benefit through the participant.).

terms of a plan.⁴¹ Section 502(a)(2) allows a participant or beneficiary or the Secretary of the Department of Labor⁴² to recover “appropriate relief” in a claim arising from a breach of fiduciary duty as referenced in ERISA § 409.⁴³ And participants, beneficiaries, or a “fiduciary”⁴⁴ may sue under § 502(a)(3)⁴⁵ to enjoin any violation of ERISA or the terms of a plan, or to obtain “other appropriate equitable relief” to redress such violations or to enforce any provision of ERISA or the terms of a plan.⁴⁶

41. 29 U.S.C. § 1132(a)(1)(B). *See supra*, note 16 (defining what is a “plan”).

42. *See* 29 U.S.C. § 1002(13).

43. 29 U.S.C. § 1132(a)(2) (cross-referencing 29 U.S.C. § 1109 (2012)). 29 U.S.C. § 1009 allows suit only against a person who is a fiduciary and instructs that any recovery obtained in a § 1132(a)(2) suit to enforce § 1109 shall be applied to “make good to [the] plan any losses to the plan resulting from each such [fiduciary] breach”). *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985).

44. 29 U.S.C. § 1002(14)(A) (2012) (describing a “party in interest”). *See Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989).

45. 29 U.S.C. § 1132(a)(3).

46. 29 U.S.C. § 1132(a), as enacted in 1974, provides as follows:

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided in subsection (c) of this section [concerning requests to the administrator for information], or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 [breach of fiduciary duty];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) [information to be furnished to participants];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), (8), or (9) of subsection (c) of this section or under subsection (i) or (l)..

29 U.S.C. § 1132 (a) (as enacted) (several additional subparagraphs have been added to § 1132(a) [§ 502(a)] since 1974.)

In several subparts of § 502, the statute identifies who can be held responsible in a claim under those specific subparts,⁴⁷ but most subparts of § 502 do not expressly limit who can be sued for a violation of the subpart. Notably, § 502(a)(1)(B) does not say anything about who can be sued or named as a party defendant in a participant's claim to recover money damages allegedly due under the terms of an ERISA-governed pension or welfare benefit plan.⁴⁸ Similarly, ERISA § 502(a)(3), which details a “catchall” remedy for appropriate equitable relief,⁴⁹ does not expressly limit the universe of possible defendants that can be held accountable under that subpart.⁵⁰

Congress included some puzzling language in ERISA § 502(d) that courts in one line of “proper party defendant” cases have interpreted to impose a limitation on who may be sued in claims filed under § 502(a)(1)(B).⁵¹ Section 502(d)(1) states that a plan “may sue or be sued . . . as an entity” and that service of process “upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service” upon the plan.⁵² Additionally, § 502(d)(2) declares that “Any money judgment [obtained] against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person *unless* liability against such person is established in his individual capacity”⁵³

ERISA § 502(d) presents two obvious questions: (1) What did Congress intend to achieve with its declaration that a plan, which is not otherwise a legal person, can sue and be sued as an

47. See 29 U.S.C. § 1132(c)(1) (administrator); 29 U.S.C. § 1132(c)(2) (plan administrator); 29 U.S.C. § 1132(c)(3) (any employer); 29 U.S.C. § 1132(c)(4) (“for each violation by any person of subsection (j), (k), or (l) of section 1021 of this title or section 1144(e)(3) of this title.”); 29 U.S.C. § 1132(c)(5) (any person); 29 U.S.C. § 1132(c)(6) (plan administrator); 29 U.S.C. § 1132(c)(7) (plan administrator); 29 U.S.C. § 1132(i) (party in interest); 29 U.S.C. § 1132(l) (fiduciary or other person); and 29 U.S.C. § 1132(m) (plan fiduciary).

48. 29 U.S.C. § 1132(a)(1)(B). The United States Supreme Court suggests that ERISA § 502 provides the exclusive remedies for all claims falling within the scope of that provision. See *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 62-66 (1987) (extending complete preemption doctrine to ERISA); *but see* *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 25-26 (1983) (refusing to apply complete preemption doctrine to ERISA and relying upon ERISA’s saving clause, ERISA § 502(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), to suggest that ERISA does not entirely preempt state insurance law remedies).

49. See *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996).

50. See discussion in text accompanying notes 82-84, *infra*.

51. See *infra* note 57-67, at 401. See also 29 U.S.C. § 1132(d)(1).

52. 29 U.S.C. § 1132(d)(1).

53. 29 U.S.C. § 1132(d)(2) (emphasis added).

“entity”;⁵⁴ and, (2) How does the “unless” clause in ERISA § 502(d)(2) modify the directive that a money judgment obtained against the plan as an entity shall not be enforceable against any other person?⁵⁵

B. THE SILLY CASES ONLY PERMIT SUIT AGAINST THE PLAN AS AN ENTITY

In a 1985 opinion, *Gelardi v. Pertec Computer Corp.*,⁵⁶ the Ninth Circuit Court of Appeals held that the only proper party defendant in a § 502(a)(1)(B) claim is the plan. The employer/plan sponsor, Pertec Computer Corp. (Pertec), self-funded the plan and hired Self-Insurance Programs (Self), a separate corporation, to serve as plan administrator. However, Self delegated final review authority back to a group of Pertec employees, designated the Pertec Employee Benefits Committee (the Committee). Self initially denied plan participant Joyce Gelardi’s disability benefits claim and then (on internal appeal) the Committee confirmed the claim denial.

Ms. Gelardi sued her employer, Pertec, and Self, the named plan administrator, presenting two ERISA claims: first, a § 502(a)(1)(B) claim to recover benefits due under the terms of the Pertec employee benefit plan; and second, a claim for breach of fiduciary duty under § 409 (actionable pursuant to § 502(a)(2)). Both defendants sought to escape responsibility for the Committee’s final claim denial, urging that they were not proper party defendants under § 502(a)(1)(B) or under § 502(a)(2).

Relying solely on a cite to § 502(d), the Ninth Circuit *Gelardi* opinion declared that the plan “entity” is the *only* proper party defendant in a § 502(a)(1)(B) claim for benefits.⁵⁷ Surprisingly, there is no discussion in the opinion exploring the language of § 502(d)(1), no recognition that § 502(a)(1)(B) does not expressly limit who can be a defendant in a claim under that subpart,⁵⁸ no mention that the “unless” clause in § 502(d)(2)

54. *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1324 (9th Cir. 1985) (per curiam).

55. *Id.*

56. *Id.*, *overruled by* *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202 (2011) (en banc).

57. *Gelardi*, 761 F.2d at 1324-1325.

58. See *Larson v. United Healthcare Ins. Co.*, 723 F.3d 905, 913 (7th Cir. 2013); *Lifecare Mgmt. Servs. v. Insurance Mgmt. Adm’rs*, 703 F.3d 835, 843 (5th Cir. 2013); *Cyr v. Reliance Std. Life Ins. Co.*, 642 F.3d 1202, 1206 (9th Cir 2011); *Leister v. Dovetail, Inc.*, 546 F.3d 875, 879 (7th Cir. 2008).

expressly contemplates that parties other than the plan can be sued under ERISA,⁵⁹ and no discussion of what Congress meant when it declared a plan to be an “entity”.⁶⁰ The Ninth Circuit upheld the district court summary judgment in favor of Pertec and Self on the § 502(a)(1)(B) claim, declaring it “self-evident” that neither the employer nor the plan administrator is the plan itself.⁶¹

ERISA § 502(d)(1) declares that a plan can sue and be sued as an entity.⁶² However, § 502(d)(2) recites that a judgment against a plan is enforceable only against the plan entity “unless” liability is established against some other person in that other person’s individual capacity.⁶³ A logical reading of ERISA § 502(d) refutes, rather than supports the *Gelardi* rationale. Setting aside for the moment the questions of what an “entity” is and what Congress intended to achieve by declaring a contract between private parties to be an entity,⁶⁴ the “unless” clause in § 502(d)(2) necessarily contemplates that other non-plan parties may be sued and held accountable under ERISA’s civil enforcement provision.⁶⁵

59. See *Larson*, 723 F.3d at 914 (quoting *Cyr*, 642 F.3d at 1207).

60. There is no description of the term “entity” in ERISA’s definitions section. See 29 U.S.C § 1002 (2012) (Definitions).

61. See *Gelardi*, 761 F.2d at 1324-1325.

62. 29 U.S.C. § 1132(d) (status of employee benefit plan as entity) recites as follows:

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. . . .

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

63. *Id.*

64. See discussion accompanying notes 169-188, *infra*.

65. See *Leister v. Dovetail, Inc.*, 546 F.3d 875, 879 (7th Cir. 2008) (stating that “[t]he first clause [of § 502(d)] just allows plans to sue or be sued, and the second clause just specifies consequences *if* the plan is sued; neither seems to be limiting the class of defendants who may be sued[.]”); *Bernstein v. Citigroup, Inc.*, No. 3:06CV209M, 2006 WL 2329385, at *3-7, 2006 U.S. Dist. LEXIS 54712 (N.D. Tex. July 5, 2006) (citing *Harris Trust and Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000)). See also *Larson v. United Healthcare Ins. Co.*, 723 F.3d 905, 914 (7th Cir. 2013) (quoting *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202, 1207 (9th Cir. 2011) (en banc)).

Following the *Gelardi* court's perfunctory cite to ERISA § 502(d), the court then examined the breach of fiduciary duty claim and found that because the employer had appointed Self as plan administrator, and Self had delegated final claims decision authority to the Committee, neither Pertec nor Self could be liable as a fiduciary in Ms. Gelardi's § 502(a)(2) claim.⁶⁶ The Ninth Circuit found that although the Committee both was made up of Pertec employees and owed Gelardi a fiduciary duty in determining claims, "this [did] not make the employer a fiduciary with respect to the Committee's acts."⁶⁷ Somehow, writing this sentence into the opinion did not cause anyone on the Ninth Circuit panel to ask whether the Committee, admittedly made up of Pertec employees and appointed by the Pertec Board of Directors, had any separate legal person existence. Nor did the panel consider whether the individual Committee members were acting on behalf of the corporate employer in exercising their fiduciary duties, or whether they might be serving as agents for Pertec, the promisor on the plan contract that the Committee was administering for Pertec. If the Committee (of Pertec employees) was acting on behalf of Pertec, presumably Pertec would have been legally responsible for the Committee's actions and exposed to *respondeat superior* liability if the Committee members committed a breach of fiduciary duty.

ERISA requires plan sponsors to appoint an administrator to manage their employee benefit plan promises. The sponsor has sole power to select the administrator and may appoint itself or one or more of its employees to serve as plan administrator. If the sponsor fails to designate a plan administrator, ERISA details that the sponsor shall be the administrator.⁶⁸ Corporations act thought their employees and agents.⁶⁹ Congress did not declare or imply that ERISA is exempt from historic agency law principles; however, without explanation, federal courts typically ignore agency law when they apply ERISA's civil enforcement scheme and determine what persons or parties may be liable under ERISA's breach of contract

66. See *Gelardi*, 761 F.2d at 1324-1325.

67. *Id.* (remarking "[The fact] [t]hat the Plan Administrator serves at the pleasure of the [Pertec] Board of Directors makes Pertec and the Board fiduciaries and liable as such only with respect to the selection of the Administrator.").

68. See 29 U.S.C. §1002(A)(ii) (2012).

69. See RESTATEMENT (THIRD) OF AGENCY §§ 1.01, 2.02, 6.01 (2006).

remedy.⁷⁰ To the extent that the Committee of Pertec employees served as the plan administrator and that a plan administrator can be held liable under § 502(a)(1)(B), the Committee, or more appropriately, the individual members of the Committee appointed by Pertec to administer the Pertec employee benefit plan were Pertec's agents, acting within the scope of their agency. Consequently, Pertec, the principal for such agents, should not have been dismissed from Ms. Gelardi's lawsuit.⁷¹

Without any inquiry into the rationale of the *Gelardi* opinion, an astonishing number of other courts have relied upon the one-sentence statement—that “ERISA permits suits to recover benefits only against the Plan as an entity”⁷²—to abruptly dismiss parties, including employer/plan sponsors, plan insurers, and plan administrators, in participant benefit claims.⁷³ It is particularly troubling that courts have been so

70. See, e.g., *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 377-379 (1999) (overruling the Ninth Circuit's application of general principles of agency law in ERISA benefits claim because ERISA preempts state law but failing to address whether a federal common law of agency should be developed and applied in ERISA claims).

71. Presumably, each individual Committee member could be sued in the § 502(a)(3) claim for breach of fiduciary duty under the *Gelardi* holding, but the individual Committee members were not obligors on the plan contract—the Committee members did not promise to provide benefits to the Pertec workers, the employer made that promise and should be held accountable under § 502(a)(1)(B) as the obligor on the plan contract.

72. *Gelardi*, 761 F.2d at 1324.

73. See *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1490 (7th Cir.1996); *Spain v. Aetna Life Ins. Co.*, 11 F.3d 129 (9th Cir. 1993); *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1993); *Gibson v. Prudential Ins. Co. of Am.*, 915 F.2d 414, 417 (9th Cir. 1990); *Madden v. ITT Long Term Disability Plan for Salaried Emp.*, 914 F.2d 1279, 1287 (9th Cir. 1990); *Crawford v. Exxon Corp.*, 851 F. Supp. 242, 244 n. 16 (M.D. La. 1994); *Holland v. Bank of Am.*, 673 F. Supp. 1511, 1518 (S.D. Cal. 1987); *Holloway v. HECI Exploration Co. Emps. Profit Sharing Plan*, 76 B.R. 563, 570 (N.D. Tex. 1987), *aff'd*, 862 F.2d 513 (5th Cir. 1988). See also *Blickenstaff v. R.R. Donnelley & Sons Co. Short Term Disability Plan*, 378 F.3d 669, 674 (7th Cir. 2004) (quoting *Neuma, Inc. v. AMP, Inc.*, 259 F.3d 864, 872 n. 4 (7th Cir. 2001) (quoting *Jass*, 88 F.3d at 1490)); *Riordan v. Commonwealth Edison Co.*, 128 F.3d 549, 551 (7th Cir. 1997) (“It is true that ERISA permits suits to recover benefits only against the plan as an entity[.]” (citing *Jass*, 88 F.3d at 1490)); *Roig v. Ltd. Long Term Disability Program*, No. 99-2460, 2000 U.S. Dist. LEXIS 11379, at *9 (E.D. La. Aug. 4, 2000) (following *Gelardi* but also citing contrary authority); *Murphy v. Wal-Mart Assocs.' Group Health Plan*, 928 F. Supp. 700, 709-710 (E.D. Tex. 1996) (failing to cite *Gelardi* but reaching result that only the plan could be sued under § 502(a)(1)(B)); *Chilcote v. Blue Cross & Blue Shield United of Wis.*, 841 F. Supp. 877, 880 (E.D. Wis. 1993) (failing to cite *Gelardi* but remarking that “It is clear under the law that the employer is not a ‘party’ to a plan for purposes of suit, and that only the plan as an entity may be sued for benefits due under a plan.”); *Miller v. Pension Plan for Emp. of Coastal Corp.*, 780 F. Supp. 768, 773 (D. Kan. 1991) (dismissing plan

cavalier in dismissing the party defendant that represents the “money” in employee benefit plan claims—the party responsible to pay the claim if the worker, in fact, prevails in a § 502(a)(1)(B) lawsuit.⁷⁴ If a court dismisses the promisor in a breach of contract lawsuit, plus the parties controlling the collateral intended to secure the promisor’s contractual obligations (the trustee in a plan funded through a trust, or the insurer in a fully insured plan),⁷⁵ how can a plan participant who wins a money judgment under § 502(a)(1)(B) collect that judgment against a plan “entity” that is not a legal person and owns no assets, or against a plan administrator that may also be judgment proof and lacking legal person status?⁷⁶ Did Congress really intend

sponsor without objection from plaintiff because plan sponsor is not a proper party defendant in a § 502(a)(1)(B) claim which only allows claims versus the plan as an entity).

74. See, e.g., *Everhart v. Allmerica Fin. Life Ins. Co.*, 277 F.3d 751 (9th Cir. 2001) (dismissing plan insurer because only the plan or plan administrator are proper party defendants in § 502(a)(1)(B) claim), *overruled by* *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202, 1207 (9th Cir. 2011) (en banc); *Crocco v. Xerox Corp.*, 137 F.3d 105, 107 (2d Cir. 1998) (holding that self-funded plan sponsor could not be liable in a § 502(a)(1)(B) benefit claim even if employer controlled the claims decision). But see *Pecor v. Northwestern Nat’l Ins. Co.*, 869 F. Supp. 651, 653 (E.D. Wis. 1994) (refusing to dismiss plan insurer and suggesting that a judgment against the plan created joint and several liability so that plan insurer could be held responsible to pay judgment entered against plan).

75. See *Everhart* at 759 (9th Cir. 2001) (Reinhardt, J., dissenting) (“I would hold that an ERISA beneficiary may sue a third-party insurer who is legally responsible, by contract, for the payment of ERISA benefits[]”), *overruled by* *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202, 1207 (9th Cir. 2011) (en banc).

76. See *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202 (9th Cir. 2011) (en banc), *Amicus curiae* brief for the Secretary of the United States Department of Labor, available at 2008 WL 6659350, at pg. 11-13.

[I]f a participant in such a suit is found to be entitled to benefits under a plan that is funded solely through an insurance policy, it is not clear how that participant can obtain those benefits in the absence of the insurer. Even if the participant or the plan or plan administrator is entitled to bring a second suit to enforce rights as a matter of state contract or insurance law, which is not at all clear given ERISA’s broad preemption provision, the ruling in the first ERISA action would not necessarily be binding as a matter of res judicata or collateral estoppel on the insurer since it was not and could not, in [the Ninth] Circuit, be part of the first adjudication. Accordingly, there is a real potential for inconsistent rulings, *i.e.*, the plan being found liable for the benefits in an ERISA suit, but the insurer being found not liable, with the result being that either the plan or the plan sponsor is forced to pay for benefits that were thought to be insured, or the ERISA participants or beneficiaries are simply not able to get the benefits to which they are entitled. Such a result is flatly inconsistent with ERISA’s goal to provide ‘a panoply of remedial devices’ for participants and beneficiaries of benefit

that the ERISA plan sponsor's promise to pay employee benefits would be a "non-recourse" promise, like the promise to make a gift was a non-recourse promise in the early days of employee benefits law—that is, a promise that could not be enforced? The *Gelardi* opinion appears to be so clearly wrong that one has to question the attentiveness of that court and the other courts that have relied upon *Gelardi* to dismiss obligor defendants in a breach of contract action, without even exploring the statutory language.

A plain reading of § 502(a) suggests that Congress did not intend to place any limit, not otherwise dictated by laws of general applicability,⁷⁷ on who could be pursued as a defendant in a § 502(a)(1)(B) claim to recover benefits due under the terms of a plan. Congress carefully thought about what parties could present claims as *plaintiffs* under ERISA's civil enforcement provision, as demonstrated by the meticulous attention to that detail in § 502(a).⁷⁸ Additionally, Congress obviously knew how to limit an ERISA claim to only certain possible party defendants, since Congress chose to do exactly that in other subparts of ERISA § 502, including §§ 502(c), 502(i), 502(k), 502(l) and 502(m).⁷⁹ Congress's decision not to place any express limit on who could be a party defendant in a § 502(a)(1)(B) action to recover benefits due under the terms of a plan appears to establish that Congress did not intend any such limitation.⁸⁰

In *Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*,⁸¹ the Supreme Court examined the assertion that only the plan could be named as a defendant in a claim for appropriate equitable relief under ERISA § 502(a)(3). Like § 502(a)(1)(B), § 502(a)(3) does not expressly limit the universe of defendants that can be pursued under that subpart of § 502. In *Harris Trust*, the Supreme Court observed that Congress was very careful in identifying who could be a plaintiff under the various subparts of § 502,⁸² and also that other subparts of section 502, in contrast

plans. (internal citations omitted).

77. See *Larson v. United Healthcare Ins. Co.*, 723 F.3d 905, 915 (7th Cir. 2013) (remarking that plaintiff must have a valid legal theory to proceed against non-plan defendant).

78. 29 U.S.C. § 1132(a) (2012). See *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 246-47 (2000).

79. See *supra*, note 48.

80. See *Cyr*, 642 F.3d at 1205-1206.

81. *Harris Trust*, 530 U.S. at 241-243, 253-254.

82. *Id.* at 246-247.

to § 502(a)(3), do expressly address who may be a defendant.⁸³ Based upon its plain meaning reading of the section, including those observations, the *Harris Trust* Court held that § 502(a)(3) proscribes no limit on the universe of possible defendants that could be pursued under that subpart.⁸⁴ The same observations the *Harris Trust* Court made regarding § 502(a)(3) apply equally to § 502(a)(1)(B) and compel the same outcome.

Despite the seemingly unassailable logic that the *Harris Trust* § 502(a)(3) holding should govern the identical controlling circumstances in claims under § 502(a)(1)(B),⁸⁵ a number of courts continued to apply the *Gelardi* holding even after *Harris Trust*.⁸⁶ One such opinion, finally overruled in 2011, is the Ninth Circuit opinion in *Everhart v. Allmerica Financial Life Insurance Co.*⁸⁷ In *Everhart*, the plan beneficiary's husband,

83. *Id.* at 246.

84. *Id.* at 246-248. Interestingly, the Supreme Court did not discuss or cite to ERISA § 502(d) in the *Harris Trust* opinion.

85. See *Larson v. United Healthcare Ins. Co.*, 723 F.3d 905, 913 (7th Cir. 2013); *Lifecare Mgmt. Serv. v. Insurance Mgmt. Adm'rs*, 703 F.3d 835, 843, n. 8 (5th Cir. 2013); *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202, 1205-1206 (9th Cir. 2011) (en banc).

86. See, e.g., *Mote v. Aetna Life Ins. Co.*, 502 F.3d 601, 610-611 (7th Cir. 2007) (dismissing plan administrator from suit and holding that only plan could be sued in participant's claim for benefits absent exceptional circumstances without citing *Harris Trust*); *Blickenstaff v. R.R. Donnelley & Sons Co. Short Term Disability Plan*, 378 F.3d 669, 674, n. 1 (7th Cir. 2004) (holding that the plan is the only proper party defendant in a § 502(a)(1)(B) claim without citing *Harris Trust* and upholding dismissal of *Donnelley & Sons*, the employer/plan sponsor/plan administrator of a self-funded disability benefits plan and Hartford, the "claims evaluator" with discretion and final authority to make claims decisions who court described as being an agent for the plan); *Everhart v. Allmerica Financial Life Ins. Co.*, 275 F.3d 751, 753-754 (9th Cir. 2001) (distinguishing *Harris Trust* without discussion); *Moody v. Liberty Life Assurance Co.*, No. C07-01017(MHP), 2007 WL 1174828 (N.D. Cal. Jan. 26, 2009) (refusing to apply *Harris Trust* precedent to a § 502(a)(1)(B) claim in reliance on *Everhart*). Cf. *Ford v. MCI Commc'ns Corp. Health and Welfare Plan*, 399 F.3d 1076, 1081-1083 (9th Cir. 2005) (ruling in a disability benefits case where plan was unfunded and employer/plan sponsor/plan administrator (MCI) was in bankruptcy and Hartford served as "claims administrator" with discretionary powers and final authority to determine claims participant sued under ERISA §§ 502(a)(1)(B), 502(a)(2), and 502(a)(3) that the plan is the only proper party defendant in a § 502(a)(1)(B) claim citing *Gelardi* but also stating that a named plan administrator could be sued under § 502(a)(1)(B) and dismissing claim versus Hartford because it was not the named plan administrator all without discussing or citing *Harris Trust*); *Harrison v. PNC Fin. Serv. Group*, 928 F. Supp. 2d 934, 943 n. 4 (S.D. Ohio 2013) (refusing to dismiss employer where participant sued to recover benefits due under § 502(a)(1)(B) and for attorney's fees because employer controlled claims decision and could be liable for attorney's fees, but refusing to apply *Harris Trust* rationale).

87. 277 F.3d 751 (9th Cir. 2001), overruled by *Cyr v. Reliance Standard Life Ins.*

who was a member of his employer's group life insurance plan, died in a plane crash. The employer/plan sponsor, Credence Systems Corp. (Credence), also served as plan administrator. Credence funded the plan through the purchase of a group insurance policy from defendant Allmerica Financial Life Insurance Co. (Allmerica).⁸⁸ The beneficiary released Credence from all claims in settling an unrelated matter, but preserved her right to pursue Allmerica for the life insurance benefits.⁸⁹

The Allmerica policy promised to pay a death benefit of two times the deceased participant's annual earnings. The dispute arose because, while the worker earned an annual salary of \$84,800, he also earned additional non-salary annual income of \$154,987. The insurer agreed to pay twice the annual salary, but refused to count the additional earnings as part of the benefits calculation. The beneficiary sued Allmerica under § 502(a)(1)(B) to recover two times her deceased husband's entire annual earnings under the terms of the plan. The district court ruled that since Allmerica was not the plan or the plan sponsor, it was not a proper party defendant, even though the insurer was legally responsible to pay any approved benefits under the group insurance contract.⁹⁰

The *Everhart* court upheld the dismissal of the plan insurer under the *Gelardi* line of cases, even after discussing a second line of cases within the same circuit⁹¹ and from other circuits that reject the narrow *Gelardi* rationale,⁹² and even after citing

Co., 642 F.3d 1202, 1207 (9th Cir. 2011) (en banc). See *Powell v. Eustis Eng'g Co.*, No. 02-1259, 2003 U.S. Dist. LEXIS 20046, at *1-12, *4 (E.D. La. Nov. 6, 2003).

88. *Everhart*, 275 F.3d at 752-53.

89. See *id.*

90. See *id.*

91. See *id.* at 754 (citing *Taft v. Equitable Life Assurance Soc'y*, 9 F.3d 1469, 1471 (9th Cir. 1993) (allowing suit versus plan administrator under ERISA § 502(a)(2)). See also *Ford v. MCI Commc'ns Corp. Health and Welfare Plan*, 399 F.3d 1076, 1081-1082 (9th Cir. 2005) (upholding dismissal of suit against ITT Hartford Insurance/Hartford Life which received delegated power to determine claims because Hartford was not the named plan administrator); *Moody v. Liberty Life Assurance Co.*, No. C07-01017(MHP), 2007 WL 1174828, at *4, n. 5, n. 6 (N.D. Cal. Jan. 26, 2009) (citing *Everhart* and *Taft* for holding that either the plan or the plan administrator may be sued in Ninth Circuit under § 502(a)(1)(B)); *Lee v. Prudential Ins. Co. of Am.*, 673 F. Supp. 998, 1003 (N.D. Cal. 1987) (suggesting that *Gelardi* ruling that only plan could be sued in a § 502(a)(1)(B) claim was dicta and holding that plan administrator could be sued in addition to the plan entity). But see *Yacobucci v. Sun Life Assurance Co.*, No. C98-4600(VRW), 1999 WL 300647, at *1 (N.D. Cal. May 10, 1999) (stating that district court ruling in *Lee* had been abrogated by further Ninth Circuit cases following *Gelardi*).

92. See *Everhart*, 275 F.3d at 754 (citing *Layes v. Mead Corp.*, 132 F.3d 1246,

Harris Trust.⁹³ The *Everhart* panel majority dismissed the precedential value of *Harris Trust* with the terse statement that Ms. Everhart did not bring suit under § 502(a)(3), rather “[s]he brought this action against Allmerica solely under § 502(a)(1)(B).”⁹⁴ Given the similarity of the proper party defendant question, whether applied to § 502(a)(3) or § 502(a)(1)(B) claims, and the persuasive rationale of the *Harris Trust* opinion, which applies with absolutely the same strength to (a)(1)(B) claims as it does to (a)(3) claims, the *Everhart* court’s failure to discuss *Harris Trust* smacks of judicial negligence. And Judge Reinhardt essentially said so in his dissenting opinion. Judge Reinhardt wrote that:

The majority . . . can point to no provision of ERISA either limiting the parties that may be sued under the statute to ERISA plans and administrators, or prohibiting suits against third-party insurers. Therefore, applying the reasoning of the Supreme Court in *Harris Trust and Savings Bank v. Salomon Smith Barney*, there is “no limit [sic] on the universe of proper defendants” (citation omitted) where the statute does not establish one. I simply cannot agree with the majority’s determination to strip from Everhart and other ERISA plan beneficiaries and participants their rights under the statute to sue parties that may be liable for the payment of the benefits owed them.⁹⁵

Judge Reinhardt’s dissenting opinion in *Everhart* foreshadowed the Ninth Circuit’s *en banc* decision in 2011 overruling the *Gelardi* line of cases.⁹⁶ However, even the second line of cases do not follow the appropriate legal paradigm to its reasonable end.

1249 (8th Cir. 1998)(permitting § 502(a)(1)(B) benefit claim against plan administrator but not employer); and *Garren v. John Hancock Mut. Life Ins. Co.*, 114 F.3d 186, 187 (11th Cir. 1997)(allowing benefit claim to proceed against party that controlled claims decision)); and *Everhart*, 275 F.3d at 758 (Reinhardt, J., dissenting). See also *Hall v. LHACO, Inc.*, 140 F.3d 1190, 1194-1195 (8th Cir. 1998) (identifying circuit split among cases).

93. See *Everhart*, 275 F.3d at 753-54.

94. *Id.* at 754.

95. *Id.* at 757, 762 (Reinhardt, J., dissenting) (citations omitted) (quoting *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 246 (2000) and calling the majority opinion “patently incorrect.”).

96. *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202, 1207 (9th Cir. 2011) (*en banc*).

C. THE BETTER CASES ALLOW SUIT VERSUS MOST ANY PARTY IN CONTROL OF CLAIMS

Recall that the only citation in *Gelardi* to support its holding that the plan and *only* the plan can be sued in a § 502(a)(1)(B) benefits claim was to ERISA section 502(d).⁹⁷ The second line of cases alternate to *Gelardi* initially allowed § 502(a)(1)(B) claims to proceed against the designated plan administrator in addition to the plan, generally on the theory that the plan administrator “controlled” the claims decision.⁹⁸

97. See *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1324-1325 (9th Cir. 1985).

98. See *Garren v. John Hancock Mut. Life Ins. Co.*, 114 F.3d 186, 187 (11th Cir. 1997) (per curiam) (upholding dismissal of insurance company that served as claims administrator but without discretionary authority, responsibility or control over plan administration because insurer was not the named plan administrator and did not control the claims decision); *Layes v. Mead Corp.*, 132 F.3d 1246, 1249-1250 (8th Cir. 1998) (allowing claim versus plan administrator but not versus employer where plan administrator controlled claims decision); *Barkin v. Patient Advocates, LLC*, 493 F. Supp. 2d 119, 121-122 (D. Me. 2007) (noting circuit split regarding whether an action for benefits under § 502(a)(1)(B) may be brought against the plan administrator, citing cases, and holding that where the plan administrator controls the claims decision it is a proper party defendant); *Kellebrew v. UNUM Life Ins. Co. of Am.*, No. H-06-0275, 2008 WL 1050664, at *2 (S.D. Tex. April 20, 2006) (refusing to dismiss benefits claim against plan administrator that controlled claims decisions). Several cases recite that a § 502(a)(1)(B) claim can proceed against the plan or a plan fiduciary and that a plan administrator is such a fiduciary. See *Terry v. Bayer Corp.*, 145 F.3d 28, 35-36 (1st Cir. 1998); *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 233 (3d Cir. 1994); *Taft v. Equitable Life Assurance Soc’y*, 9 F.3d 1469, 1471 (9th Cir. 1993). In the cases allowing suit versus the plan administrator where the administrator is designated to be a Committee of the plan sponsor’s employees, courts have typically failed to explore the question of whether the administrator had status as a legal person. See, e.g., *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323, 1324-1325 (9th Cir. 1985); *Boyer v. J.A. Majors Co. Emps.’ Profit Sharing Plan*, 481 F. Supp. 454, 457-458 (N.D. Ga. 1979) (holding that employer company not a proper party defendant where the Committee appointed to administer the plan was “a viable, operating entity which, together with the trustee bank, was wholly responsible for administering the profit sharing plan.”). However, several opinions suggest that the plan administrator serves as an agent for the plan. See *Leister v. Dovetail, Inc.*, 546 F.3d 875, 879 (7th Cir. 2008) (Posner, J.) (remarking that if a suit named and served the plan administrator that would be the equivalent of suing the plan presumably because the plan administrator was the agent of the plan), or that a judgment against the plan creates joint and several liability against the plan insurer. See *Pecor v. Northwestern Nat’l Ins. Co.*, 869 F. Supp. 651, 653 (E.D. Wis. 1994) (stating in a very confusing passage that:

Suing and serving Fort Howard, in its capacity as plan administrator, was sufficient to obtain jurisdiction over the Plan, but does not provide a basis for suing Fort Howard in its capacity as employer. The distinction determines which entity’s assets could be subject to a judgment. A suit for benefits is a suit against the plan,

Similarly focusing on the question of who controlled the claims decision, several courts expanded the universe of defendants to include “*de facto*” plan administrators—that is, parties who were not named as the plan administrator, but who may have received delegated authority to determine claims.⁹⁹ Consequently, we see cases where an insurance company designated as a claims administrator or claims evaluator or third-party administrator (TPA) with final authority to review claims and discretion to determine claims was a proper party defendant in a § 502(a)(1)(B) action.¹⁰⁰ However, in a similar circumstance where the “*de facto*” plan administrator/insurer was not designated as the plan administrator and only provided claims services without final authority to decide claims, the alleged *de facto* administrator was found not to be a proper party defendant.¹⁰¹ Additionally, under the line of cases focusing on

and in this case, a suit against the insurance company with whom the plan contracted to provide the benefits at issue. Any judgment obtained is a joint and several judgment against the assets of the Plan and NNIC. It is not and should not be a judgment against the general assets of the employer. Fort Howard is dismissed.

But how can a juristic person be an agent for a non-juristic person? The better view is that the plan administrator is an agent for the plan sponsor that appointed the administrator.

99. *Compare* *Rosen v. TRW, Inc.*, 979 F.2d 191 (11th Cir. 1992) (holding that employer who controls plan administration and is *de facto* plan administrator can be held accountable under § 502(a)(1)(B)), *with* *Crocco v. Xerox Corp.*, 137 F.3d 105 (2d Cir. 1998) (rejecting *de facto* plan administrator theory of liability under § 502(a)(1)(B)). There is a circuit split of authority on the question of whether some party other than the party designated as the plan administrator in the plan instrument can be a *de facto* administrator of the plan subject to liability as a fiduciary under § 502(a)(1)(B). *See* *Hall v. LHACO, Inc.*, 140 F.3d 1190, 1195 (8th Cir. 1998) (citing *Jones v. UOP*, 16 F.3d 141, 145 (7th Cir. 1994) (Posner, J.)). *See also* *Lifecare Mgmt. Servs. v. Insurance Mgmt. Adm’rs*, 703 F.3d 835, 843-845 (5th Cir. 2013) (holding that if a person other than the named plan administrator takes on the role of a plan administrator and controls claims decisions such other person may be liable in an ERISA benefits claim) (identifying split of authority and citing cases).

100. *See* *Evans v. Employee Benefit Plan, Camp Dresser & McKee, Inc.*, No. 07-3552, 2009 U.S. App. LEXIS 3426, at *557-61, *558 (3d Cir. Feb. 20, 2009). *See also* *Bernstein v. Citigroup Inc.*, No. 3:06CV209M, 2006 WL 2329385, at *3-7, 2006 U.S. Dist. LEXIS 54712 (N.D. Tex. July 5, 2006) (identifying split of authority and citing cases). *But see* *Ford v. MCI Commc’ns Corp. Health and Welfare Plan*, 399 F.3d 1076, 1081-1082 (9th Cir. 2005) (holding that insurer designated as claims evaluator and that received delegated authority to exercise discretion and to make final benefit claim eligibility decisions but was not the formally named plan administrator was not a proper party defendant in a § 502(a)(1)(B) claim for benefits); *Blickenstaff v. R.R. Donnelley & Sons Co. Short Term Disability Plan*, 378 F.3d 669, 671-672, n. 1 (7th Cir. 2004).

101. *See* *Garren v. John Hancock Mut. Life Ins. Co.*, 114 F.3d 186, 187 (11th Cir.

control, employers who did not necessarily have expressly delegated authority to decide claims (though a committee of employees may have been designated as the plan administrator), but who had assumed such authority, were found to be proper party defendants.¹⁰²

Certainly these cases improve on the *Gelardi* line, but the focus on who controls the claims decision still fails to recognize the contractual basis of the employee benefit promise and obligation. Concentration on control as a basis for liability

1997) (per curiam). See also *Terry v. Bayer Corp.*, 145 F.3d 28, 35-36 (1st Cir. 1998) (ruling in a disability benefits action against named defendants employer/plan sponsor and the plan that court would review the plan administrator Committee's decision to deny benefits and not the insurer/TPA's initial denial decision because the services agreement between the insurer/TPA and the plan sponsor indicated that the plan sponsor retained final authority to determine claims and administer the plan though court did not decide whether the plan sponsor was a separate entity from the Committee of plan sponsor employees that served as plan administrator).

102. See *Musmeci v. Schwegmann Giant Super Markets, Inc.*, 332 F.3d 339, 349-350 (5th Cir. 2003) (holding that where plan has no meaningful existence apart from the employer and corporate employer/plan sponsor controls benefits decisions employer may be liable in an ERISA benefits claim); *Mein v. Carus Corp.*, 241 F.3d 581, 584-85 (7th Cir. 2001) ("While it is silly not to name the plan as a defendant in an ERISA suit, we see no . . . reason to have this case stand starkly for the proposition that the plan is always the only proper defendant . . .") (citing *Riordan v. Commonwealth Edison Co.*, 128 F.3d 549, 551 (7th Cir. 1997) (holding that where employer corporation and the plan are closely intertwined employer can be sued in a § 502(a)(1)(B) action)); *Rosen v. TRW, Inc.*, 979 F.2d 191, 192-193 (11th Cir. 1992) (holding that if a corporate employer/plan sponsor exercises control as a *de facto* plan administrator it can be liable for ERISA violations including claim for benefits); *Daniel v. Eaton Corp.*, 839 F.2d 263, 266 (6th Cir. 1988) (holding employer that controlled claims decision could be liable in ERISA benefits claim); *Foulke v. Bethlehem 1980 Salaried Pension Plan*, 565 F. Supp. 882 (E.D. Pa. 1983) (denying employer's motion to dismiss because evidence indicated that employer was actively involved in plan administration). See also *Law v. Ernst & Young*, 956 F.2d 364, 373-374 (1st Cir. 1992) (holding that in a claim under ERISA § 502(c) for statutory penalties, a corporate employer/plan sponsor that operated as a *de facto* plan administrator could be liable); *Leister v. Dovetail, Inc.*, 546 F.3d 875, 879 (7th Cir. 2008) (Posner, J.) (suggesting that the when corporate employer failed to comply with formalities in identifying and maintaining separate ERISA entities the company itself and two principal shareholders could be liable in a participant's benefits claim). But see *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 240 (3d Cir. 1994) (McKelvie, J., sitting by designation, dissenting) ("I believe that ERISA does permit a person to sue an employer, regardless of whether or not the employer is a plan or a fiduciary... Indeed, 29 U.S.C. § 1132(d) expressly contemplates that a person other than a plan may be held liable. One of Congress' primary purposes for enacting ERISA is 'to protect contractually defined benefits.'") (internal citations omitted); *Boyer v. J.A. Majors Co. Emps.' Profit Sharing Plan*, 481 F. Supp. 454, 457-58 (N.D. Ga. 1979) (holding that employer company was not a proper party defendant where a designated Committee served as plan administrator wholly responsible for administering the plan).

suggests that § 502(a)(1)(B) claims are founded upon an imposed legal duty, such as a tort duty or perhaps a fiduciary duty. But a § 502(a)(1)(B) claim seeks legal damages for breach of the plan contract—it seeks to recover benefits due *under the terms* of the written instrument. The plan is the instrument—the contract—that details the plan sponsor’s promise to its workers. A trust instrument also has “terms,” and there is a contractarian component to trusts,¹⁰³ but under ERISA, the trust is a separate legal instrument from the plan (and a trust similarly does not have status as a juristic person).¹⁰⁴ The ERISA plan trust serves as a form of security to assure that if it is determined that a plan contract provides coverage, there will be funds available to pay the claim and a legal person with assets, the trustee, that can be served and that can be legally ordered to pay a judgment.¹⁰⁵ Interestingly, Senator Javits’ initial pension reform bill¹⁰⁶ proposed only to regulate pension plans, and it required all pension plans to be funded through a trust or “fund,”¹⁰⁷ or through the purchase of insurance.¹⁰⁸ This first pension reform bill also would have granted participants or persons entitled to receive benefits from employee benefit funds or plans the right to sue “any such fund or plan to recover benefits.”¹⁰⁹ Under a similar statutory model authorizing claims for breach of a collective-bargaining agreement under LMRA § 301, the “fund” is required to be organized and established as a trust, and the

103. See John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995).

104. See *generally* *Lazenby v. Codman*, 116 F.2d 607, 609 (2d Cir. 1940) (stating that at common law a trust cannot sue or be sued because “it is not a juristic person.”). See also RESTATEMENT (THIRD) OF TRUSTS, ch. 21, intro note (2012) (remarking that “a trustee is personally liable on any contract made by the trustee, even if the trustee acted properly.” However, a faultless trustee could be indemnified from trust assets).

105. Notably, ERISA does not require that welfare plans be funded, see 29 U.S.C. § 1081(a)(1)(2012) (exempting welfare plans from ERISA’s funding requirements). Consequently, in many welfare plans where the plan is unfunded or funded through the purchase of an insurance policy, there is no trust at all. See, e.g., *UNUM Life Ins. Co. of Am., v. Ward*, 526 U.S. 358 (1999) (fully insured disability benefits plan); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) (unfunded severance plan).

106. S. 1103, 90th Cong. (1967).

107. The bill defined an “employees’ benefit fund” to be a trust fund or a contractual right under an insurance policy. See *id.* at § 2(4), (23).

108. See *id.* at § 2(4) (reciting that to the extent benefits under an employees’ benefit plan are provided through insurance “such plan shall not be deemed to involve an employees’ benefit fund” as that defined in the bill).

109. *Id.* at § 504.

statute provides for service of process on the fund trustee.¹¹⁰

The ERISA plan sponsor is the promisor under the plan contract. Under contract law, the promisor is obligated to pay the benefits detailed in the written plan instrument, assuming that the covered worker has completed his or her part of the bargain by performing the agreed upon labor. A recent Seventh Circuit case, *Larson v. United Healthcare Insurance Co.*,¹¹¹ finally approaches the issue from this correct legal paradigm, ruling that plan insurers that both determine claims and pay approved benefits can be sued under ERISA § 502(a)(1)(B), not because they control the claims decision, but because they are the contract obligors under the insurance policy purchased by the plan sponsor to pay the promised benefits.¹¹²

In *Larson*, participants in various fully insured ERISA health care benefit plans sued the insurers maintaining that the insurers owed additional benefits to the participants under a Wisconsin “mandated provider” health insurance law. The participants read the state law to mean that health insurers in Wisconsin could not charge participants a \$30-\$60 co-pay for each of their visits to a chiropractor.¹¹³ The district court granted the insurers’ motions to dismiss because the Seventh Circuit had previously ruled that employee benefits are “an obligation of the plan,” consequently, the plan is the logical and normally the only proper defendant in a claim for benefits due under § 502(a)(1)(B).¹¹⁴ The Seventh Circuit *Larson* court repeated the general rule that the plan is ordinarily the only proper party defendant, but found that general rule allowed for

110. See 29 U.S.C. § 185(d) (2013).

111. 723 F.3d 905 (7th Cir. 2013).

112. See *id.* at 913. See also *Everhart v. Allmerica Financial Life Ins. Co.*, 275 F.3d 751, 759 (9th Cir. 2001) (Reinhardt, J., dissenting) (“I would hold that an ERISA beneficiary may sue a third-party insurer who is legally responsible, by contract, for the payment of ERISA benefits.”), *overruled by* *Cyr v. Reliance Standard Life Ins. Co.*, 642 F.3d 1202, 1207 (9th Cir. 2011) (*en banc*); *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 240 (3d Cir. 1994) (McKelvie, J. dissenting) (“I believe that ERISA does permit a person to sue an employer to enforce contractual promises made by the employer, regardless of whether or not the employer is a plan or a fiduciary.”).

113. See *id.* at 909 and n.2. Because the copayments amount was often more than the cost of each chiropractor visit, the participants urged that allowing such copayments violated the intent of the mandated provider law. The *Larson* court ultimately ruled in favor of the insurers on the merits, finding that the Wisconsin law did not prohibit such copayments. See *id.* at 918.

114. See *Larson v. United Healthcare Ins. Co.*, No. 11-cv-473-bbc., 2012 WL 7179136, at 1, 4 (W.D. Wis. Jan. 3, 2012) (quoting *Leister v. Dovetail Inc.*, 546 F.3d 875, 879 (7th Cir. 2008)).

exceptions.¹¹⁵ Focusing on who was the obligor in the current claims, rather than just the party that controlled the claims decision (though admittedly the insurers filled both roles in this case), the *Larson* court ruled that the insurers were proper parties because they were the obligors under the plan contract.¹¹⁶

The *Larson* case is most significant for its rationale, recognizing that a plan is a contract and that breach of contract actions are pursued against the contract obligor.¹¹⁷ The court stated:

An ERISA § 502(a)(1)(B) claim “is essentially a contract remedy under the terms of the plan.” The Supreme Court has explained that the remedy provided in § [502(a)(1)(B)] is designed “to protect contractually defined benefits,” and in keeping with its contract-law foundations, the cause of action offers typical contract forms of relief, including recovery of benefits accrued or otherwise due. . . . The claim is governed by a federal common law of contract keyed to the policies codified in ERISA.¹¹⁸

While several other courts prior to *Larson* expressly allowed participants to sue plan insurers in their ERISA benefits claims because the insurers controlled the claims decision,¹¹⁹ and

115. See *Larson*, 723 F.3d at 913.

116. See *id.* (reciting that: “Health plans are often structured around third-party payors. When an employee benefits plan is implemented by insurance and the insurance company decides contractual eligibility and benefits questions and pays the claims, an action against the insurer for benefits due ‘is precisely the civil action authorized by § 1132(a)(1)(B).’”) (quoting *Cyr*, 642 F.3d at 1207).

117. See *Larson*, 723 F.3d at 911.

118. *Id.* (internal citations omitted) (quoting *Ponsetti v. GE Pension Plan*, 614 F.3d 684, 695 (7th Cir. 2010), and *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) (citing *Jones v. Am. Gen. Life & Accident Ins. Co.*, 370 F.3d 1065, 1069 (11th Cir. 2004)); *Burstein v. Retirement Account Plan of Emps. of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 381 (3d Cir. 2003) (“Claims for ERISA plan benefits under ERISA § 502(a)(1)(B) are contractual in nature.”); *Estate of Bratton v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 215 F.3d 516, 523 (5th Cir. 2000) (“ERISA § 502(a)(1)(B) . . . provides a contract based cause of action to participants and beneficiaries to recover benefits, enforce rights, or clarify rights to future benefits, under the terms of an employee benefit plan.”); *Mathews v. Sears Pension Plan*, 144 F.3d 461, 465 (7th Cir. 1998) (“[T]he relevant principles of contract interpretation are not those of any particular state’s contract law, but rather are a body of federal common law tailored to the policies of ERISA.”).

119. See, e.g., *Layes v. Mead Corp.*, 132 F.3d 1246, 1249 (8th Cir. 1998) (holding that insurer serving as plan administrator that controlled claims decision could be responsible in benefits claim); *Am. Surgical Assistants, Inc. v. Great West*

innumerable courts allowed § 502(a)(1)(B) claims to proceed against plan insurers without discussion of whether the insurer was a proper party defendant,¹²⁰ *Larson* appears to be the first circuit court opinion that fully engages in an analysis of the proper party defendant issue and then applies the proper contract law-based paradigm to support its holding.¹²¹

III. THE PLAN IS A CONTRACT AND THE PLAN ADMINISTRATOR IS AN AGENT FOR THE PROMISOR ON THE CONTRACT

A plan is a contract.¹²² Unfortunately, harkening back to the *Lochner* era, ERISA courts have generally applied very restrictive contract interpretation rules in ERISA breach of contract claims.¹²³ This is contrary to ERISA's stated purpose to

Healthcare of Texas, Inc., No. H-09-0646, 2010 U.S. Dist. LEXIS 13573 at * 7-11 (S.D. Tex. Feb. 17, 2010) (holding insurer serving as plan administrator with control of claims decision could be liable in ERISA benefits claim); *Cook v. Liberty Life Assur. Co.*, No. 00-408, 2002 WL 482572, at *2, 2003 U.S. Dist. LEXIS 5580, at *7 (D. N.H. 2002) (same). *But see* *Mote v. Aetna Life Ins. Co.*, 502 F.3d 601, 610-11 (7th Cir. 2007) (upholding dismissal of plan insurer as not a proper party defendant, but not clarifying whether the insurer was the plan obligor or just a service provider).

120. *See, e.g.*, *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008); *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002); *UNUM Life Ins. Co. v. Ward*, 526 U.S. 358 (1999); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

121. *See also* *Everhart v. Allmerica Financial Life Ins. Co.*, 275 F.3d 751, 759 (9th Cir. 2001) (Reinhardt, J., dissenting) (the dissent recites that “both parties that legally owe the benefits and parties that have the legal power to determine or pay benefits because they administer them, are proper party defendants in an ERISA suit under § [502](a)(1)(B).”).

122. *See* *M & G Polymers USA v. Tackett*, 135 S. Ct. 926, 929 (2015). *See also* *Cigna Corp v. Amara*, 131 S. Ct. 1866, 1884 (2011) (Scalia, J., concurring in part) (remarking that to reform the plan contract to conform with contrary representations in the SPD, “the Court would be employing that doctrine to alter the terms of a contract in response to a third party's misrepresentations—not those of a party to the contract.”); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989) (“ERISA was enacted to promote the interests of employees and their beneficiaries in employee benefit plans and to protect contractually defined benefits[.]” (citations omitted) (internal quotations omitted); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (ERISA § 502(a)(1)(B) presents a claim “to recover accrued benefits, . . . under the provisions of the plan contract[.]”); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1472-1475 (9th Cir. 1997) (comparing the breach of fiduciary duty claim under ERISA § 502(a)(3) and claim for breach of the plan contract under 29 U.S.C. § 1132(a)(1)(B)(2012)).

123. *See* *Fisk, Lochner Redux*, *supra* note 7, at 155-161 (remarking that ERISA courts have largely refused to apply modern theories of promissory estoppel and equitable estoppel, instead reciting that they are bound to apply the strict terms of

regulate private pension plans and thereby better protect participants' reasonable expectations to receive benefits under ERISA than in pre-ERISA years.¹²⁴ Consumer advocates probably expected better outcomes for workers under ERISA and modern contract law—which accounts for discrepancies in bargaining power—than ERISA courts have produced.¹²⁵ As a consequence, at least one prominent commentator has urged courts to reject pure contract law as the legal paradigm governing ERISA plans and instead to develop a common law of plans that would better promote Congress's more participant-protective purposes.¹²⁶ But our federal courts have generally not accepted that challenge and have continued to apply *laissez-faire* contract law principles, especially in welfare plan cases, for example, to enforce aggressive reservation of rights clauses that effectively guarantee unrestrained managerial power.¹²⁷

the plan). Professor Fisk suggests that contract law should be informed by ERISA's public policy considerations under modern contract law to better achieve ERISA's overarching goals. Courts have expressed similar views. *See, e.g.,* *Larson v. United Healthcare Ins. Co.*, 723 F.3d 905, 911 (7th Cir. 2013) ("The [502(a)(1)(B)] claim is governed by a federal common law of contract keyed to the policies codified in ERISA. The relevant principles of contract interpretation are not those of any particular state's contract law, but rather are a body of federal common law tailored to the policies of ERISA.") (internal citations omitted) (internal quotations omitted).

124. *See* 29 U.S.C. § 1001 (Findings and declaration of policy). *See also* Conison, *Foundations*, *supra* note 5, at 633 ("[T]he undisputed main purpose of ERISA is to help ensure the realization of benefit expectations that arise from these employer programs. ERISA's minimum standards, plan termination insurance provisions, disclosure rules, fiduciary standards, and enforcement provisions are all designed to help protect employee expectations. ERISA invests the priority of interests in a benefit plan, rejecting the common law's approach and instead strongly favoring employee interests over those of the employer.").

125. *See* Fisk, *Lochner Redux*, *supra* note 7, at 155-159 (noting that non-union employee benefit plans are invariably written by the employer's lawyers and are seldom subject to negotiation between employers and individual workers, or in insured plans even between the employer on behalf of their workers and the insurer, and urging that ERISA courts, applying modern contract law, should recognize the relative absence of notions of consent and negotiation that legitimate the use of contracts as a form of social ordering).

126. *See* Conison, *Foundations*, *supra* note 5, at 589-618 and n. 64. Professor Conison acknowledges the generally accepted history that courts first viewed an employer's promise to provide a pension benefit as a promise to make gift, and that the courts eventually changed that viewpoint and began to enforce plan promises under contract law, albeit under a restrictive liberty of contract theory. However, Professor Conison rejects the contract law-based paradigm to resolve ERISA benefits claims because that paradigm had not served employees well prior to ERISA, and it has not served Congress's protective purposes well under ERISA.

127. *See* Fisk, *Lochner Redux*, *supra* note 7, at 155. *See, e.g.,* *Owens v. Storehouse, Inc.*, 984 F.2d 394, 397 (11th Cir. 1993) (holding that employer did not discriminate against worker with AIDS in violation of 29 U.S.C. § 1140 when

This is the case except when contract law provides process protections for plan participants, such as the right to a *de novo*, plenary trial governed by the Federal Rules of Civil Procedure in a breach a contract action,¹²⁸ the right to a jury trial in a breach of contract claim seeking money damages,¹²⁹ and when participants sue the promisor under the plan contract—that is, the plan sponsor, or the plan insurer in an insured plan. When plan participants seek the protections of these well-established contract law-based processes in their ERISA § 502(a)(1)(B) claims, federal courts have ruled that trust law guides the standard of review issue,¹³⁰ and that the right to a jury trial is generally inapplicable because a § 502(a)(1)(B) claim seeks equitable relief or is incompatible with the summary adjudication system developed under deferential review in

employer reduced lifetime cap for treatment of HIV-related conditions from generally applicable cap of \$1,000,000 to \$25,000, reciting that plan reservation of rights language gave sponsor the “full, absolute and discretionary right to amend, modify, suspend, withdraw, discontinue or terminate the Plan in whole or in part at any time for any and all participants of the Plan.”); *McGann v. H & H Music Co.*, 946 F.2d 401, 408 (5th Cir. 1991), *cert denied*, 506 U.S. 98 (1992) (employer altered its group medical plan by reducing benefits for AIDS-related claims from the generally applicable lifetime cap of \$1,000,000 to \$5,000). ERISA generally prohibits plan sponsors from altering or amending pension plan promises to vested participants that would have the effect of reducing promised and earned pension benefits. *See* ERISA §§ 201-208, 29 U.S.C. §§ 1051-1058 (Part 2—Participation and Vesting), and ERISA § 204(g), 29 U.S.C. § 1054(g) (Anti-cutback rule). *See generally* EMPLOYEE BENEFITS LAW, *supra* note 25, at ch. 5.V. (Vesting and Benefit Accrual Rules).

128. *See* *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008) (holding that when ERISA courts apply an abuse of discretion standard of review in an ERISA “review proceeding,” courts must count the plan administrator’s conflict of interest as a factor in that abuse of discretion review). *See generally* EMPLOYEE BENEFITS LAW, *supra* note 25, at ch. 13, IV. (Judicial Review).

129. *See* discussion and cases cited in footnote 131, *infra*.

130. *See* *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-114 (1989) (suggesting that a deferential trust law-based standard of review should govern ERISA § 502(a)(1)(B) claims if the plan sponsor empowers the plan administrator with discretionary authority to determine eligibility for benefits). *Firestone* is a schizophrenic opinion, waffling between the application of trust law and contract law to govern ERISA § 502(a)(1)(B) benefit claims. *Compare id.* at 111 (“In determining the appropriate standard of review for actions under § [502](a)(1)(B), we are guided by principles of trust law.”), *with id.* at 114 (“ERISA was enacted to . . . protect contractually defined benefits.”), and *id.* at 112-113 (“The trust law *de novo* standard of review is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA. Actions challenging an employer’s denial of benefits before the enactment of ERISA were governed by principles of contract law. If the plan did not give the employer or administrator discretionary or final authority to construe uncertain terms, the court reviewed the employee’s claim as it would have any other contract claim by looking to the terms of the plan and other manifestations of the parties’ intent.”).

ERISA benefit claims.¹³¹ And, as we have seen, participants cannot sue the contract obligor under the employee benefit plan contract, except now in the Seventh Circuit¹³² and presumably in the Ninth Circuit.¹³³ Given the proper party defendant cases, it is necessary to briefly explore the contractual nature of employee benefit plans and to examine how courts have treated the promise to provide employee benefits in circumstances other than in the standard of review and jury trial circumstances.

Historically, we have viewed the employment relationship as founded upon the mutual agreements of employer and employee, where in its simplest form, the worker agrees to provide labor in exchange for the employer's agreement to provide compensation. The employment contract has been increasingly regulated over the years. Laws have been enacted to regulate worker hours, to prohibit discrimination in employment, to mandate a minimum wage, and now the Affordable Care Act mandates that private employers with a minimum of fifty full time workers offer health insurance coverage as part of the employment contract.¹³⁴

131. See *e.g.*, *Blake v. Unionmutual Stock Life Ins. Co. of Am.*, 906 F.2d 1525, 1526-27 (11th Cir. 1990) (per curiam) (citing cases) (striking demand for jury trial because a § 502(a)(1)(B) action to recover money damages due under the plan for a denial of benefits states a claim for equitable relief); *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820, 829 (7th Cir. 1980) ("We conclude that Congress' silence on the jury right issue reflects an intention that suits for pension benefits by disappointed applicants are equitable."). Some district courts have suggested that *Firestone*, 489 U.S. 101 (1989), discredited the decisions ruling that a § 502(a)(1)(B) claim seeks equitable relief and therefore have refused to strike a demand for a jury trial. See *e.g.*, *Hulcher v. United Behavioral Sys.*, 919 F. Supp. 879, 883 and n.5 (E.D. Va. 1995). See also *Vaughn v. Owen Steel Co.*, 871 F. Supp. 247, 250-51 (D. S.C. 1994) (finding that a § 502(a)(1)(B) claim under ERISA is analogous to state law contract claim and must be tried before a jury); *Gangitano v. NN Investors Life Insurance Co.*, 733 F. Supp. 342 (S.D. Fla.1990)(holding that constitutional right to jury trial exists in § 502(a)(1)(B) action); *Stamps v. Michigan Teamsters Joint Council No. 43*, 431 F. Supp. 745 (E.D. Mich. 1977) (holding that claims under § 502(a)(1)(B) are legal rather than equitable and allowing jury trial). See generally *Plaintiff's Right to Jury Trial in Civil Action under § 502(a)(1)(B) of Employee Retirement Income Security Act*, 56 A.L.R. FED. 880 (Originally published in 1982); *EMPLOYEE BENEFITS LAW*, *supra* note 25, at ch., 12 III.H. (Jury Trials).

132. See *Larson v. United Healthcare Ins. Co.*, 723 F.3d 905, 913, 916 (7th Cir. 2013).

133. See *Cyr v. Reliance Std. Life Ins. Co.*, 642 F.3d 1202, 1206-1207 (9th Cir. 2011).

134. Under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (codified at 42 U.S.C. and in various section of the Internal Revenue code) [hereafter "ACA"], private employers with more than 50 full-time equivalent employees are now generally required to

In 1935, the Wagner Act first allowed workers to organize, and it authorized labor organizations to collectively-bargain with employers on behalf of their member workers “in respect to rates of pay, wages, hours of employment, or other conditions of employment.”¹³⁵ In *Inland Steel Co. v. National Labor Relations Board*,¹³⁶ the Seventh Circuit Court of Appeals held that employers must collectively-bargain with unions to negotiate the terms of employee benefit plans because employee benefits fit within the definition of “conditions of employment” under the Wagner Act.¹³⁷ The United States Supreme Court has confirmed that a collective-bargaining agreement is a contract, and that in an action to recover damages for breach of a collective-bargaining agreement, the parties are entitled to a jury trial under the Seventh Amendment of the United States Constitution.¹³⁸ Similarly, a plan is a contract,¹³⁹ and like a claim seeking damages for breach of a collective-bargaining agreement under LMRA § 301, a participant seeking money damages for breach of the plan contract under ERISA § 502(a)(1)(B) should enjoy the right to a *de novo*, plenary jury trial in a suit against the obligor under the plan contract.¹⁴⁰

provide health insurance coverage for their workers and their dependents up to age 26, or the employer will have to pay a penalty. See 26 U.S.C. § 4980H (known commonly as the “employer mandate”).

135. See National Labor Relations Act (Wagner Act or NLRA), 49 Stat. 449, 29 U.S.C. § 151 *et seq.*, amended by Labor Management Relations Act, 1947 (Taft-Hartley Act or LMRA), effective August 22, 1947, 61 Stat. 136, 29 U.S.C. § 141 *et seq.* NLRA section 8(5), now codified at 29 U.S.C. § 157, requires an employer “to bargain collectively” with the representatives of his employees. Section 9(a), now codified at 29 U.S.C. § 158(d), requires the employer and the representative of the employees to meet and confer in good faith “with respect to wages, hours, or other terms and conditions of employment”

136. 170 F.2d 247 (7th Cir. 1948).

137. See *id.* at 250.

138. See *Chauffeurs, Teamsters and Helpers, Local No. 391*, 494 U.S. 558, 569-570 (1989) (holding in union workers’ fair representation action seeking money damages versus the employer and union that underlying LMRA § 301 claim is comparable to a breach of contract action and that the remedy sought legal relief entitling parties to jury trial).

139. See *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015) (“We interpret collective-bargaining agreements, including those establishing ERISA plans, according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy.”).

140. See Mark D. DeBofsky, *A Critical Appraisal of the Current State of ERISA Civil Procedure — An Examination of How Courts Treat “Civil Actions” Brought under the Retirement Income Security Act*, 18 CHI.-KENT EM. RIGHTS & EMP. POL’Y J. 203 (2014); Donald T. Bogan and Benjamin Fu, *ERISA: No Further Inquiry into Conflicted Plan Administrator Claim Denials*, 58 OKLA. L. REV. 637 (2005).

In ERISA, Congress decided to regulate the employee benefit contract for all workers, not just union workers. Representative John Dent (D. Pa.), one of several Congressional leaders, along with Senator Jacob Javits (R. N.Y.) and Senator Harrison Williams (D. Pa.), who sponsored the primary ERISA bills, H.R. 2 in the House and S. 4 in the Senate, stated that “we started out with only one aim in view and that was to give a pension participant his entitlements under the contract of the pension plan he belonged to.”¹⁴¹ Congress was not trying to create a new field of law in ERISA—it was just regulating the plan contract, similar to how the states have regulated insurance contracts by adopting consumer protections¹⁴² and imposing mandates that are incorporated into the insurance contract as a matter of law.¹⁴³

Congress infused trust law principles into the employee benefit contract through the imposition of fiduciary obligations, and created separate remedies in ERISA § 502 for breach of fiduciary duty¹⁴⁴ and for other appropriate equitable relief.¹⁴⁵ During the time Congress was considering ERISA, California state courts first recognized that an insurer owed a duty of good faith and fair dealing as an implied obligation under an insurance contract and that an insurer may be liable in extra-contractual damages for breach of that implied duty.¹⁴⁶ ERISA’s

141. Remarks of Rep. Dent, *reprinted in* 3 LEGISLATIVE HISTORY, *supra* note 8, at 4665.

142. *See, e.g.*, STEPHEN S. ASHLEY, *BAD FAITH ACTIONS: LIABILITY AND DAMAGES* ch. 9, 9-5 n.22 (2d ed. 1997) (describing the National Association of Insurance Commissioners, Model Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts in Practices in the Business of Insurance, and providing citations to all the states that have adopted the Model Act).

143. *See, e.g.*, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (holding that state insurance law, which required all applicable insurance policies that provided health care benefits also include a minimum of \$50,000 of coverage to treat mental health problems, is saved from ERISA preemption). *See generally* Robert S. McDonough, *ERISA Preemption of State Mandated-Provider Laws*, 1985 DUKE L.J. 1194, at 1194-1196 n.8 (citing series of mandated-coverage laws enacted by the various states as of the date of the article).

144. *See* 29 U.S.C. § 1132(a)(2)(2012).

145. *See* 29 U.S.C. § 1132(a)(3).

146. *See* *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1036-37 (1973); *Crisci v. Security Ins. Co.*, 426 P.2d 173 (Cal. 1967); *Fletcher v. Western Nat. Life Ins. Co.*, 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (4th Dist. 1970). For earlier cases in the development of the tort of bad faith breach of an insurance contract, *see* *Comunale v. Traders & General Ins. Co.*, 328 P.2d 198, 200-202 (1958); *Hilker v. Western Automobile Ins. Co.*, 231 N.W. 257 (Wis. 1930), *aff’d on rehearing*, 253 N.W. 413 (Wis. 1931); *Brassil v. Maryland Cas. Co.*, 104 N.E. 622 (N.Y. 1914). *See generally* ASHLEY, *supra* note 142 at ch. 2.

imposition of fiduciary duties for administrators of plan contracts creates obligations similar to the obligations imposed on insurers under the duty of good faith and fair dealing.¹⁴⁷ In other parts of ERISA, Congress directly regulated the terms of the employee benefit plan contract, for example, by mandating that plan sponsors fund private pension plans.¹⁴⁸ Congress also detailed vesting rules that govern private pension plans,¹⁴⁹ which plan sponsors generally cannot avoid through reservation of rights clauses or other contrary plan language. ERISA's funding and vesting rules are effectively incorporated into the pension plan contract the same way that statutory mandated-coverage laws are impliedly incorporated into group health insurance contracts under state insurance law, thereby preventing the plan sponsor from contracting out of these ERISA requirements.¹⁵⁰

In ERISA, Congress federalized a worker's contract law remedy to recover benefits due under a plan by promulgating § 502(a)(1)(B).¹⁵¹ In *Massachusetts Mutual Life Insurance Co. v. Russell*,¹⁵² the Supreme Court clearly identified the plan as a contract and a § 502(a)(1)(B) benefit claim as one for breach of the plan contract. Doris Russell was a Massachusetts Mutual Life Insurance Co. employee and a member of the employer's self-funded disability benefits plan. She submitted a claim under the plan seeking benefits, which she ultimately received. However, due to the plan administrator's alleged bad faith and delay in processing the claim, Ms. Russell filed a lawsuit (against her employer/plan administrator) seeking extra-contractual damages. The Ninth Circuit Court of Appeals

147. ERISA courts have generally rejected claims for extra-contractual damages arising from a breach of fiduciary duty under ERISA. See *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), *overruling*, *Russell v. Massachusetts Mut. Life Ins. Co.*, 722 F.2d 482 (9th Cir. 1983). See generally LEWIS ET AL., *supra* note 25, at ch. 12 III.I. (Extracontractual Compensatory and Punitive Damages).

148. See 29 U.S.C. §§ 1081-85.

149. See 29 U.S.C. §§ 1051-58.

150. See, e.g., *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 379 (1999) (holding that state common law notice-prejudice law was incorporated into the subject insurance contract to modify the policy notice provision and that notice-prejudice rule was saved from ERISA preemption).

151. 29 U.S.C. § 1132(a)(1)(B). See 3 LEGISLATIVE HISTORY, *supra* note 8, at 5284 (Staff Comment on the Senate bill dealing with Preemption of State Law and Jurisdiction of State Courts: "The conferees may wish to follow the approach of the House bill and also provide that State court jurisdiction with respect to employee benefit plans is to extend only to contract actions.").

152. 473 U.S. 134 (1985).

upheld the claim under ERISA § 502(a)(2)¹⁵³ (as the enforcement arm for a breach of fiduciary duty under ERISA § 409),¹⁵⁴ and ruled that a participant could recover extra-contractual damages—including punitive damages—for such a breach of fiduciary duty.¹⁵⁵

Notably, in *Russell*, Justice Stevens stated that if the participant had not received all of her contract benefits, she could have pursued an action under § 502(a)(1)(B) “to recover accrued benefits . . . under the provisions of the plan contract.”¹⁵⁶ Justice Stevens thereafter remarked that a “repeatedly emphasized purpose” of ERISA was “to protect contractually defined benefits.”¹⁵⁷

In 2002, the Supreme Court examined the interrelation of ERISA’s civil enforcement scheme in the context of an insurer’s claim to enforce its contractual right to subrogation or reimbursement under the terms of the plan. In *Great-West Life & Annuity Insurance Co. v. Knudson*,¹⁵⁸ the insurer had paid medical bills for a plan participant, but then wanted to recoup those payments when the plan beneficiary obtained a third-party tort recovery. Because the ERISA provision authorizing recovery of contractual benefits, § 502(a)(1)(B), runs only to a plan participant or beneficiary, Great-West could not sue under ERISA to enforce its contractual rights. Consequently, Great-West crafted its pleading as a claim for equitable relief under ERISA § 502(a)(3).¹⁵⁹

The Supreme Court held that despite Great-West’s characterization of the claim as one for equitable restitution, it was really seeking money damages, which were not available under § 502(a)(3).¹⁶⁰ Notably, while evaluating the nature of Great West’s § 502(a)(3) claim, the Court contrasted that claim for equitable relief with ERISA’s express remedy under §

153. 29 U.S.C. § 1132(a)(2).

154. 29 U.S.C. § 1109.

155. See *Russell v. Massachusetts Mut. Life Ins. Co.*, 722 F.2d 482, 489-92 (9th Cir. 1983). The Supreme Court overruled the Ninth Circuit’s holding that a participant could recover punitive damages in a claim under ERISA § 502(a)(2). See *Russell*, 473 U.S. at 145-48.

156. *Russell*, 473 U.S. at 147. Ms. Russell did not file a §502(a)(1)(B) claim to recover benefits due under the terms of the plan because she had received, albeit belatedly, all she was due under the plan contract. See *Russell*, 722 F.2d at 487.

157. *Russell*, 473 U.S. at 148.

158. 534 U.S. 204 (2002).

159. See *id.* at 210.

160. See *id.*

502(a)(1)(B), which allows a plan participant “to enforce his rights under the plan.”¹⁶¹

In the sole instance where the Supreme Court characterized a § 502(a)(1)(B) claim as, perhaps, one for breach of fiduciary duty, Justice Thomas, joined by Justices O’Connor and Scalia, discredited that *dictum* in a persuasive dissenting opinion passage. In *Varity Corp v. Howe*,¹⁶² workers sued their former employer seeking individual relief under ERISA § 502(a)(3) for breach of fiduciary duty. In *Varity*, a plan fiduciary allegedly made misrepresentations that caused workers to release Varity from its obligations under an existing plan in exchange for coverage under a new plan with a new spin-off corporation. The workers could not pursue their contractual claim for benefits due under § 502(a)(1)(B) because they were no longer employees of Varity or participants in the old plan. Instead, the workers pursued a breach of fiduciary duty claim seeking individual damages (and not damages on behalf of the plan) against Varity for “other appropriate equitable relief” under 502(a)(3).¹⁶³

Varity argued that ERISA only allows a claim for breach of fiduciary duty under ERISA § 502(a)(2),¹⁶⁴ and that to construe the “other appropriate equitable relief” language of 502(a)(3) as allowing individual damages for breach of fiduciary duty would be redundant. Rejecting Varity’s redundancy argument, the *Varity* majority mused that § 502(a)(1)(B) also provides a remedy for breach of fiduciary duty.¹⁶⁵ Justice Thomas directly challenged that remark. He stated:

The majority apparently believes that § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), “provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims.” *Ante*, at 1077 (citing *Russell*, 473 U.S., at 144, 105 S.Ct. at 309).

161. See *id.* at 220-21. See also *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993). In *Mertens*, the Court was similarly engaged in defining the parameters of a claim for fiduciary breach, here under ERISA §502(a)(3). In making that comparison, the Court stated: “Money damages are, of course, the classic form of legal relief.” *Id.* at 255. See also *LaRue v. DeWolff, Boberg and Assocs., Inc.*, 552 U.S. 248, 257-58 (2008) (Roberts, C.J., concurring) (suggesting that the plan participant’s characterization of her claim as one for equitable relief may have been a ruse to avoid the limitations of ERISA’s breach of contract remedy under 29 U.S.C. § 1132(a)(1)(B)(2012)).

162. 516 U.S. 489 (1996).

163. See *Varity*, 516 U.S. at 515.

164. 29 U.S.C. § 1132(a)(2).

165. See *Varity*, 516 U.S. at 512 (citing *Firestone*, 489 U.S. at 108, 109).

Since, in the majority's view, § 502(a)(1)(B) allows for individual recovery for fiduciary breach outside the framework created by §§ 409 and 502(a)(2), the majority wonders "[w]hy should we not conclude that Congress provided yet other remedies for yet other breaches of other sorts of fiduciary obligation in another, 'catchall' remedial section?" *Ante*, at 1077.

The answer is simple. Contrary to the majority's understanding, § 502(a)(1)(B) does *not* create a cause of action for fiduciary breach, and *Russell* expressly rejected the claim that it does. Thus, the entire premise of the question is flawed. Section 502(a)(1)(B) deals exclusively with contractual rights under the plan.¹⁶⁶

An action to recover benefits due under the terms of a plan states a claim to recover money damages for breach of contract. While trust law may inform the ERISA remedy for breach of fiduciary duty under § 502(a)(2), trust law has no connection with ERISA's separate remedy to recover benefits due under a the terms of a plan contract. The law abounds with circumstances where claimants may select from alternative remedies governed by different legal paradigms.¹⁶⁷ ERISA's legislative history establishes that Congress intended fiduciary principles to supplement contractual obligations where necessary, in order to secure protections for plan beneficiaries, rather than to indiscriminately apply a body of law based upon motivations of gratuitous transfers of property to all ERISA plans and causes of action. Indeed, with respect to unfunded or

166. *See id.* at 521 n.2 (Thomas, J., dissenting) (emphasis in original).

167. For example, doctors serve as fiduciaries to their patients. *See* Leslie J. Miller, *Informed Consent: I*, 244 JAMA 2100, 2100 (1980). If a disgruntled patient decides to sue her doctor, she may assert a negligence claim, or a breach of contract claim, or a breach of fiduciary duty claim. If the patient chooses to pursue a breach of contract claim against the doctor, courts do not apply trust law to the action and courts do not defer to the doctor's decision-making, simply because the doctor owed a fiduciary duty to the patient. *See* Dingle v. Belin, 749 A.2d 157, 164 (Md. 2000) ("Most [actions against doctors] are tort-based . . . and occasionally, in misrepresentation or fraud; some are contract-based. When they are pursued either alternatively or in combination, care must be taken to keep the actions separate and not to allow the theories, elements, and recoverable damages to become improperly intertwined."). *See also* Rash v. J.V. Intermediate, LTD, 498 F.3d 1201, 1207 (10th Cir. 2007) (fiduciary duty and breach of contract claims arising from employment relationship); Garrett v. Bryan Cave, LLP, 2000 U.S. App. LEXIS 7339, *11-16 (10th Cir. 2000) (unpublished) (citing Missouri and Oklahoma cases where both negligence and breach of fiduciary duty claims were separately pursued against lawyers).

insured welfare benefit plans, Congress contemplated straightforward contractual rather than donative law principles to govern benefit disputes:

[The fiduciary responsibility section] when read in connection with the definition of the term “employee benefit fund” makes it clear that the fiduciary provisions apply only to those funds which leave assets at risk. While [ERISA] has the effect of requiring all retirement plans subject of that Act to be financed through the medium of a segregated fund, there may be welfare funds . . . such as those providing sickness or disability benefits, which may not be funded. Thus, an unfunded plan in which the only assets from which benefits are paid are the general assets of the employer is not covered.¹⁶⁸

IV. CONGRESS ATTEMPTED TO GRANT THE PLAN JURAL EXISTENCE, BUT CONGRESS DOES NOT CREATE PLANS AND ARGUABLY CANNOT GIVE A PLAN EXISTENCE AS A LEGAL PERSON

It is difficult at first reading to understand what Congress intended to accomplish with the language in ERISA § 502(d),¹⁶⁹ but reference to § 301(b) of the Labor Management Relations Act (LMRA)¹⁷⁰ provides guidance. The language in ERISA § 502(d) appears to have been lifted directly from LMRA § 301(b),¹⁷¹ which recites that:

[a] labor organization may sue or be sued as an entity and in behalf of the employees whom it represents . . .
Any money judgment against a labor organization . . .

168. S. REP. NO. 93-127, at 28-30 (1973), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 8, at 614-16.

169. *See supra* note 62 (reprinting 29 U.S.C. 1132(d) as enacted).

170. *See* 29 U.S.C. § 185(b).

171. 29 U.S.C. § 185(b) (Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments) (“Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.”).

shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.¹⁷²

A Senate Report supporting the amendment to LMRA § 301 to add subpart (b) provides background explaining why Congress wanted to allow unions to sue and be sued as an entity.¹⁷³ The Senate Report explains the problem corporate employers faced in the early years of labor negotiations when they had difficulty enforcing labor contracts with labor unions.

Unions are typically organized as unincorporated associations.¹⁷⁴ The enactment of the Wagner Act¹⁷⁵ in 1935 granted unions the right to represent workers and to bargain collectively with employers on behalf of members. Collective-bargaining contracts are enforceable under LMRA § 301 by both management and by the labor organization that are parties to the contract.¹⁷⁶ However, when corporate employers sought to enforce collective-bargaining agreements prior to the LMRA, they often found that the union was not a legal person that could be served with process,¹⁷⁷ and union assets could not be reached to pay any damage judgment or to enforce any decree entered against the union as an unincorporated association.¹⁷⁸

172. *See id.*

173. *See* S. REP. 105, 80TH CONG. 1ST SESS. at 15-18 (March 24, 1947), *reprinted in* LEGIS. HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, (March 24, 1947) at 421-424 (1985) [hereinafter NLRB Print].

174. *See id.* at 16, 1 NLRB Print, *supra* note 173 at 425.

175. *See* National Labor Relations Act of 1935, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-169 (1935) (Wagner Act)). *See also* 29 U.S.C. § 151 (declaring in part that: "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.").

176. *See* 29 U.S.C. § 185(a). *See also* *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 467-69 (1960) (holding in an action by the trustee of a union benefit fund that the corporate employer's asserted counterclaim against the union could not reach the trustee or the assets of the fund because the trustee (as representative of the fund) was a separate legal person from the union).

177. *See* S. REP. 105, 80TH CONG., 1ST SESS. at 16 (March 24, 1947), 1 NLRB Print, *supra* note 173, at 425 (citing *Grant v. Carpenters' District Council*, 322 Pa. 62 (Pa. Sup. 1936)).

178. *See id.* at 17; 1 NLRB Print, *supra* note 173, at 425 (citing *Aalco Laundry Co. v. Laundry Linen Union*, 115 S.W.2d 89 (Mo. App. 1938)). Additionally, the

Consequently, we know that Congress enacted LMRA § 301(b), declaring that a union can sue and be sued as an entity, because unions, as unincorporated associations, could not be served or sued or otherwise held responsible under a legal judgment or decree because the union did not exist as a legal or “juristic” person. In response to state law that often prevented a corporate employer from enforcing a collective-bargaining agreement, Congress added LMRA § 301(b) to provide some basis in federal law for courts to obtain power over unincorporated unions and for corporate employers to obtain an enforceable judgment or decree against a union.

Congress declared that a union can sue and be sued as an entity, but LMRA § 301(b) lacks the “unless” clause in ERISA § 502(d)(2).¹⁷⁹ This is a crucial difference because the “unless” clause in ERISA § 502(d)(2) necessarily contemplates that parties other than the plan can be sued in an ERISA benefits claim.¹⁸⁰ But beyond that difference, the question still arises, does Congress’s declaration that a non-juristic entity—a plan—can sue and be sued, in and of itself, create a legal person? Assuming that a union is an unincorporated association, it is still an association of legal persons (individual workers); but a plan, and particularly an unfunded plan, is just a promise written down on a piece of paper—it is a contract.¹⁸¹ And Congress is not even a party to the contract, which is an agreement between private parties (the employer/plan sponsor and the workers). Does Congress create a legal person by simply declaring in a statute that a contract between private parties can sue and be sued?

In *M’Culloch v. Maryland*,¹⁸² the Supreme Court held that Congress can charter and thereby create a corporation because that is a “necessary and proper” use of Congress’s commerce

Senate Report found that: “the National Labor Relations Board has held it an unfair labor practice for an employer to insist that a union incorporate or post a bond to establish some sort of legal responsibility under a collective bargaining agreement.” *Id.* at 15, 1 NLRB Print, *supra* note 173, at 425.

179. 29 U.S.C. § 1132(d)(2) (“Any money judgment . . . against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person *unless* liability against such person is established in his individual capacity . . .”) (emphasis added).

180. See *Cyr v. Reliance Std. Life Ins. Co.*, 642 F3d 1202, 1206-1207 (9th Cir. 2011).

181. ERISA requires that “[e]very employee benefit plan shall be established and maintained pursuant to a written instrument.” 29 U.S.C. § 1102(a)(1).

182. 17 U.S. 316 (1819) (Marshall, C.J.).

clause power.¹⁸³ But in *M'Culloch* and in a subsequent United States Bank case, *Osborn v. Bank of the United States*,¹⁸⁴ the Court focused on the fact that Congress adopted a specific statute, which served as the Bank's charter, to create the Bank.¹⁸⁵ One of the powers granted in the charter was the power to sue and be sued, but there was also a lot more to the charter.¹⁸⁶ Effectively, the statute served as the corporate charter creating a legal person; and in the same statute Congress granted the newly created legal person the power to sue and be sued. It is unclear, however, whether by merely declaring in a statute that a non-juristic entity can sue and be sued, Congress has done enough to create a legal person.

It appears that Congress included § 502(d) in ERISA because it recognized that a plan was not a legal person and because it wanted to allow suits against an ERISA plan (particularly multi-employer plans) in similar fashion to how the LMRA allows suits against unions. Unfortunately, ERISA does not define the term entity; and an entity is not necessarily a legal person. According to Wikipedia, a stone can be an entity.¹⁸⁷ Could Congress declare, in any particular statute, that a stone, like a plan, can sue and be sued as an entity? If Congress declares that something—anything—that is not a juristic person can sue and be sued, does that naked declaration thereby give such thing the status of a juristic person? Fortunately, this interesting question should not have any practical bearing on how ERISA benefits claims are prosecuted, so long as a participant is not restricted to suing *only* the plan.¹⁸⁸

183. See *id.* at 406-421.

184. 22 U.S. 738 (1824) (Marshall, C.J.).

185. See *id.* at 823-24; *M'Culloch*, 17 U.S. at 317-18.

186. See *Osborn*, 22 U.S. 738 at 816-17.

187. "An entity is something that exists in itself, actually or potentially, concretely or abstractly, physically or not. It need not be of material existence. In particular, abstractions and legal fictions are usually regarded as entities. In general, there is also no presumption that an entity is animate. The word may refer, for example, to Bucephalus, the horse of Alexander; to a stone; to a cardinal number; to a language; or to ghosts or other spirits."

188. Does the fact that Congress declared that a union can sue and be sued as an entity necessarily mean that a union is a legal person? Congress does not create unions, or plans, and neither LMRA § 301(b) nor ERISA § 502(d) involves the exercise of Congressional power to charter a federal corporation. See *M'Culloch v. Maryland*, 17 U.S. 316, 406-424 (1819). Exploration of this point is beyond the scope of this paper. For purposes of this paper, so long ERISA § 502(d) is applied to allow participants to sue the plan sponsor or plan insurer or any other obligor on the employee benefit plan contract, the fact that they may also sue the plan as an entity will have limited practical consequence.

V. CONCLUSION

ERISA § 502(d) does not limit the universe of defendants that can be sued to recover benefits due under the terms of an employee benefit plan. Congress's declaration that a plan can sue and be sued as an entity presents complex questions. What is Congress's authority to declare a thing subject to suit, when that thing is not a creation of Congressional action in the first place (the private parties create the plan contract, not Congress), and does not otherwise have status as a juristic person. If courts allow participants and beneficiaries in § 502(a)(1)(B) claims to sue plan sponsors or insurers that are the obligors under a plan contract, however, that issue will presumably have little practical significance.

The declaration in ERISA § 502(d) that a plan can sue and be sued as an entity does not mean that a plan is the *only* party that can be sued in an ERISA benefits claim. In *Harris Trust*, the Supreme Court made that absolutely clear in a case arising under ERISA § 502(a)(3), where the very same circumstances applied—that is, neither § 502(a)(3), nor § 502(a)(1)(B) expressly limits the field of possible defendants that can be sued under either of those ERISA § 502 subparts. A plan is a contract, and as the Seventh Circuit recently held, it is the obligor under the plan contract that should be pursued in an ERISA benefits claim. Allowing participants to sue the party that is actually responsible to pay benefits due under the terms of a plan makes perfect sense, comports with Congressional policy in enacting ERISA, and is true to the real undertakings of the parties when a plan is established.

Further, recognizing that a plan is contract, courts should apply contract law-based processes to govern ERISA § 502(a)(1)(B) claims to recover benefits due under the terms of a plan. That not only means that the promisor under the plan contract a proper party defendant in a §502(a)(1)(B) action; it also means that courts should process such breach of contract claims as *de novo*, plenary actions, without deferring to one of the parties to the contract (the plan administrator as agent for the plan sponsor/insurer), while also guaranteeing the parties' right to a jury trial under the Seventh Amendment to the United States Constitution.